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THE HUMAN FACE OF THE CHURCH LAW

**Edited by
Varghese Koluthara**

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A JOURNAL OF CHRISTIAN INTERPRETATION

The Human Face of the Church Law

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Editorial

The Second Vatican Council has made a radical change in the self-understanding of the Church in her relation to the modern world. The Code of Canon Law (CIC 1983) of the Latin Church and the Code of Canons of the Oriental Churches (CCEO 1990) were promulgated in the light of this new self-understanding. The human and the liberative dimensions of law are central in the revision and formulation of these new Codes. This issue of *Jeevadhara* is designed to highlight the human face of the Church Law. It will introduce our readers to the pluralistic existence of the law of the Church and get them familiarized with its inner dynamics.

George Nedungattu, in his article, *Laws - Alienating or Liberative?* shows that laws, in general, have a bad name because they are thought to be alienating people from reality rather than be a force of liberation. The author makes a scientific study of the terms 'alienation' and 'liberation'; starting from an etymological analysis, he finds its meaning in the history of philosophy. Seeking sufficient support from the Bible, the author points out that law should be at the service of justice and the ministry of canon law is a ministry of liberation and of freedom rather than alienation.

Jose Porunnedom, in his article, explains that laws in the Church are medicinal rather than punitive. Laws, especially penal laws, in the Church are to be understood as having the same finality as that of the Church herself, namely, the salvation of souls. To the uninitiated, however, laws may appear to be too abstract and rigid. It is the responsibility of those who are called to apply laws in concrete situations to interpret the apparently abstract and rigid laws in the right spirit and to apply them correctly.

The Church founded by Christ and spread throughout the Roman Empire and outside, was pluralistic in her nature and operation right from the beginning of her history. Varghese Koluthara develops the theme of the *Plurality of codes of Canon Law in the Church*. This pluralistic existence has been qualified by Pope John Paul II as 'the church gathered in the one spirit breathing as though with two lungs of the East and of the West and burning with the love of Christ in one heart having two ventricles'. The present day *corpus* of Canon Law has three units, namely, the Code of Canon Law of the Latin Church (CIC), *Pastor Bonus* (on administration of Roman Curia) and the Code of Canons of the Eastern Churches (CCEO). The author explains the pluralistic existence of the Catholic Church as a communion between the Latin and the Oriental Churches through her history and depicts the human face of Church

Law with the complementary character of the three units of the *Corpus* of Canon Law as a vehicle of Charity.

Women enjoy a true equality and dignity with men and cooperate in building up the body of Christ in accord with their condition and function. Rose McDermott in her article explains the magisterial teachings and analyses critically the juridical position of women in the present Codes of Canon Law and their dignity and status as presented in the decrees of the Second Vatican Council. It is done through a comparative study on *CIC* 1917 and the present Codes of Canon Law. She observes that the Codes of Canon Law duly recognize the increasing role of women in the church.

The conclusive articles by P. D. Mathew, on law and judicial activism in India clarifies the judicial activism that brings justice to the poor and the oppressed. The author narrates the circumstances, which forced our courts to play an activist's role. The role of judges, according to him, to interpret the constitution is crucial to the situations of the people. Every interpretation must be guided and inspired by the social philosophy and values of the Constitutions. The author also introduces the rationale of Public Interest Litigation, meant to safeguard Fundamental Human Rights.

Every law has a purpose. The new law codes, which are the reformed laws of the church with the legal verbalizations of the theology of II Vatican Council, should promote the ecclesial life within the Church. Her laws arise out of her very need for the discipline as well as her thrust for promoting human freedom and justice. Law, in general, and especially the laws of the Church is not meant to inhibit human freedom but rather to promote and enhance it. I hope this issue of *Jeevadhara* will help us to have a positive outlook for the laws of the Church. Though the oriental and western approaches on the law are different, they are meant to promote, love, grace charism, equity, charity and justice in the life of the church as a community. Hence, the *corpus* of canon law has 'to be an instrument in the service of the economy of salvation of souls' and it should become 'the supreme end of all the laws of the Church. This positive perspective, on the pluralistic laws of the church as complementing and not contradicting each other, will pave the way for tranquillity of order in the Church of Christ. Basically the codes of canon law are instruments of the universal church to achieve this tranquillity and peace among the twenty-two *sui iuris* churches in their *communio* within the Catholic Church. Thus the human face of the law of the Church will make her ever young and 'never grow old'. It is the mission and task of every catholic and especially the pastors of both the Latin and the oriental Churches to make a thorough study on the pluralistic laws of the Church and to implement them in promoting charity in the Church.

Laws Alienating or Liberating?

George Nedungattu

Laws, in general, have a bad name that they are alienating people from reality rather than being a force of liberation. In answering this question, the author makes a scientific study of the terms: alienation and liberation. Starting from an etymological analysis, he finds its meaning in the history of philosophy. Seeking sufficient support from the Bible, he points out that law is rightly conceived as being in the service of justice and the ministry of canon law is a ministry of liberation and freedom. Prof. Dr. George Nedungattu, S.J., Pontifical Oriental Institute, I-00185 Rome, Italy; Editor, *Kanonika*; Consulor of the Pontifical Commission for the Revision and Codification of Oriental Canon Law.

“Our reputation is far from the best. Civil lawyers, of course, have an even worse reputation than canon lawyers, and they seem to be the butt of far more jokes than we.”¹ So has mused recently “an old canon lawyer” offering his reflections on being a canonist. And he identified as follows the reason for this bad reputation of canonists: very many people think that canonists are in the service of the institutional Church with its vested interests; with their expertise in canon law canonists only seek to “keep people in line”. They “lock the Holy Spirit out of the lives” of the people, nullifying their call “to a life of freedom” and thus making them “regard canon law as generally pernicious”.²

This, however, is “only half the story”, according to the same veteran canonist. “Certainly, the Canon Law Society of America and other canon law societies as well have, for the past many years, enjoyed a wonderful reputation” in organizing Church structures and for “promoting and maintaining peace and justice in our communities. All of which has immensely enhanced the reputation of canon law and canon lawyers

...being of assistance to people with legal problems".³ These problems can be varied, involving the protection of rights and reputations or the resolution of marriage cases. "A cleric who has been unfairly treated by his bishop; or a bishop who has been falsely accused of malfeasance; or a layperson whose rights have been ignored by a school board, or who, as a child, was molested by a cleric"⁴ — in these and such like cases advice and legal aid are eagerly sought from canonists. Canonists have the drudgery of working with such cases in ecclesiastical tribunals, but have also the joy of sorting them out and helping to render justice, which is reason enough to be proud of their "joyful vocation", according to the same veteran canonist.

So, it would seem that the canonist, like the ancient Roman god Janus, has two faces: one repulsive and the other attractive. The canonist, however, may see the duplicity in the beholder who seeks him out in need but at other times has no use of him save as the butt of jokes. Law is like medicine: when you are sick, you badly need it and would not mind paying a fortune to recover health; once recovered, you forget the medicine and share the traditional jibes about the greed of doctors. Lawyers and doctors seem to be destined to alternating opposed appraisal and treatment: for winning a landmark case or successfully performing a critical surgery they draw the highest accolade and encomium, although as a category they later serve rather for leisurely humour. The lot of canonists is cast in like manner. But there is more in their case, since at times theological or charismatic condemnation is launched against them as those who sin against the gospel, or do not let people live their Christian freedom, or professionally "lock the Holy Spirit out of people's lives."

If in the United States and in some other countries like it there has been a second spring for canon law, and in place of the traditional sneer and snob there is a renewed esteem, the situation obtaining elsewhere may not be the same. In countries like India where ecclesiastical tribunals, except in a few instances, are rather new and have not yet established a reputation for the service rendered by canonical jurisprudence to be reckoned with, canon law and canonists are more likely to serve in the traditional manner as "butt of jokes", or for the joyful avocation of others. Implicitly, the best they merit is condescending benevolence when they are not dismissed as agents of alienation in contrast to theologians esteemed for serving liberation. But does law (and not only canon law) stand for alienation or liberation?

1. Alienation

Alienation is a polyvalent term having multiple meanings dispersed in different branches of knowledge, so that its use here without some terminological explanation risks compounding confusion. The English word "alienation" derives from the Latin *alienatio*, corresponding to the Greek *apallotriosis*, which has the original legal meaning of transfer of property and/or property rights. Early on, the Latin term was used to signify also the loss of friendship (Cicero)⁵ and refer to "mental disorder or derangement" in medicine (Celsus)⁶ or ecstasy, as in St. Paul's vision of the Risen Christ on the road to Damascus (Augustine).⁷ But in modern times "alienation", whose usage spread rapidly in the second half of the twentieth century in connection with the discussion of the Marxist concept of alienation, has been surcharged with a multiplicity of meanings in various disciplines.

The concept of alienation may be employed by psychologists, sociologists, philosophers, theologians, etc., but the meaning of the term differs so radically from discipline to discipline that it may convey the illusory sense of retaining a single meaning through all its various uses, which is decidedly not the case. ...For this reason alone pronouncements regarding phenomena of alienation are extremely unclear.⁸

Given such diversity of meanings, it is deceptive to attempt a definition of alienation, which would only create the illusion of its having a single meaning. We need rather to advert briefly to these several meanings before determining the precise sense in which we want to use the word.

In everyday usage alienation often means turning away or keeping away from former friends or associates. In law it usually refers to the transfer of property from one person to another, either by sale or as a gift. In psychiatry alienation usually means deviation from normality, that is, insanity. In contemporary psychology and sociology it is often used to name an individual's feeling of alienness toward society, nature, other people, or himself [or herself]. For many sociologists and philosophers, alienation is the same as reification: the act (or result of the act) of transforming human properties, relations, and actions into the properties and actions of things which are independent of Man⁹ and which govern his life. For other

philosophers, "alienation" means self- alienation" (self-estrangement): the process, or result of the process, by which a "self" (God or Man) through itself (through its own action) becomes alien (strange) to itself (to its own nature).¹⁰

In order to understand especially this last cluster of meanings we have to turn to the history of philosophy. In the nineteenth century G. W. Friedrich Hegel (1770-1831) gave currency to the term alienation after Johann G. Fichte (1762-1814) had launched it into the philosophical language of German idealism. According to Hegel, all produced objects become alien to the producer whether the producer be the Absolute Idea (Mind, Spirit, Self, or God) or the finite human mind, which are ultimately one. Nature itself is but the self-alienated form of the Absolute Mind or God. And Man is essentially the Absolute itself in the reverse process of dealienation through self-awareness of the finite mind. Law (Recht) belongs to the process by which the Spirit transcends the singularity of the individuals through dealienation, which is the "return" to the Self from self-alienation. Whenever the finite mind is active producing things, whether physical things, social institutions or cultural products, it objectifies itself and the result is alienation inasmuch as the produced objects become alien to the producer. Dealienation is only possible through self-knowledge of the Absolute, which alone is real. The real is identical with the rational. "An existence in general that is the existence of the free will, is law (Recht). Law in general is, therefore, freedom as an idea."¹¹ Alienation is thus overcome by law. However, since in Hegelian idealism individual persons as such do not count for real, "the most grandiose philosophy of law ends up with the negation of law as the object of philosophy."¹²

While Ludwig A. Feuerbach (1804-1872) took over the Hegelian concept of alienation and applied it to religion, relegating God as self-alienated Man and advocated the suppression of religion for the dealienation of Man, Karl Marx (1818-1883) spoke of Man's self-alienation in and through work and all human products like law. Marx veered away from Hegel's idealism and criticised him for identifying objectification with alienation and proposing pure thought as the means for overcoming alienation. Marx himself ceased using this term explicitly in his writings of more mature age, in which however the idea is present implicitly. His position is basically "materialistic" as opposed to Hegelian idealism and may be summarised as follows.

Man not only alienates a part of himself in the form of God; he also alienates other products of his spiritual activity in the form of philosophy, common sense, art, morals, and so on. He alienates products of his economic activity in the form of commodities, money, capital, etc.; he alienates products of his social activity in the form of the state, law and social institutions. Thus, there are many forms in which Man alienates from himself the products of his own activity and makes of them a separate, independent, and powerful world of objects toward which he is related as a slave, powerless and dependent. ... All these kinds of alienation are, in the last analysis, one: they are only different aspects of Man's self-alienation, different forms of the alienation of Man from his human "essence" or "nature", from his humanity.¹³

For Marx, then, law is a product of Man's social activity and a means of self-alienation. He conceived it as a "superstructure" of society like religion and morals. The law of England concerning factories, for example, writes Marx, "is an inevitable product of the great industries just like the thread of cotton, the automatic machines and the electric telegraph."¹⁴ Whereas Hegel had exalted law (*Recht*), together with morality (*Moralität*) and "ethicity" (*Sittlichkeit*), as the culminating point of the objectification of the Spirit, for Marx law was but a transient superstructure. Thus he viewed the Napoleonic code as the mirror of the bourgeois society born in the XVIII century and developed in the XIX. And with the vanishing of that society this code itself is abolished. Addressing that society Marx and Engels scoffed at law: "Your law (*Recht*) is only the will of your class elevated as law (*Gesetz*)."¹⁵ During his trial in Cologne in 1849 for instigation to insurrection, Marx told the jury that that code had no more validity and was "only a dozen ream of paper (*ein Ballen Papier*)."¹⁶ Communism is the Marxist solution to bring about the dealienation of society. Marx maintained that law (*Recht*) and communism are incompatible: there is a contradiction (*Gegensatz*) between the two, which exists not only when law (*Recht*) is presented in the form of enacted law (*Gesetz*) but also "in its more general form of human rights."¹⁷ Marx saw communism not as "a state of things to be set up" but rather as "a real movement which abolishes the present state of things",¹⁸ as the supersession of human alienation and the return of Man from religion, family, state, law, etc. to his true humanity.¹⁹ With it the old society gives way to "an association in which the free development of each will be the condition for the free development of all."²⁰

This Marxist ideology was thrust into centre-stage after World War II engaging Marxists and non-Marxists in controversy or dialogue, in which philosophers (especially existentialists and personalists) or psychologists (especially psychoanalysts),²¹ sociologists,²² literary critics and writers took part. There was no presiding genius to give direction to the discussions, and the result has been the mushrooming of meanings. As regards the philosophy of law, if law had been exalted by Hegel for its redeeming function of dealienation, law was being condemned as the agent and expression of alienation by Marxists. In between these contradictory extremes a whole host of meanings emerged ranging from any non-adjustment of the individual to society to serious mental disorder or psychopathology. Some would speak of society itself as alienated or sick, others speak of alienation that is not necessarily pathological and distinguish "alienation (a psychological state of the individual characterised by feelings of estrangement) both from anomie (relative normlessness in a social system) and from personal disorganization (disordered behaviour arising from conflict within the individual)." Others would limit alienation to the sphere of society and regard it as associated with economic, political, societal or ethical activity.²³

Our concern here is not to give a full account of alienation. Let us only note that in the degenerate variants of Marxism called economic determinism individuals are merely the products of social organization, and social organization is determined by economic life conditioned in its turn by the question whether the means of production are or are not private property — and private property is the real original sin of humanity, the abolition of which is his redemption. Marx criticized "the materialist doctrine that men are products of circumstances and upbringing" and held that "it is men that change circumstances" through "revolutionizing practice (Praxis)"²⁴ — the distant murmuring for the clarion call to Revolution.

Marx was alienated from the bourgeois society he lived in and he tried to change it unsuccessfully. But he considered himself not alienated from his true self inasmuch as he rebelled against that society and refused to submit to its laws. Defy the laws of all bourgeois societies in view of the eschatological ideal or paradise of the communist society: such is the Marxist gospel of liberation and freedom. This gospel still survives as an ideology even after the collapse of world communism towards the

end of the twentieth century. And the tempting legacy of that gospel is to overcome all alienation caused by laws by defying them and be reborn as true humans into everlasting freedom.

In a sense this siren call of materialistic humanism is not new. Couched in different terms its raucous accents had been heard long ago in the pre-Christian Greece of Sophists. The best critical appraisal of the Marxist view of law as alienation is the history of philosophy, if only out of courtesy to Marx, who rejected philosophy as an alienating “miserable” superstructure²⁵ and would not surely want to have his ideology qualified as philosophy. Let us, therefore, take a look at alienation in the history of the philosophy of law.

2. Laws as Alienating in the History of Philosophy

While the ancient Indian sages glorified law as follows, “Law is the king of kings, than whom law is more powerful and exacting; with law as with the aid of a sovereign monarch even the weak can prevail over the mighty”,²⁶ the Greek Sophists scoffed at law as the mutable caprice of the powerful to exploit the weak and the poor. The term itself “sophist” was originally neutral and designated the “wise” and so meant “philosopher”. The Sophists were able dialecticians and some of them (Protagoras, Gorgias, Hippias, Callicles, and Trasimachus) enjoyed considerable reputation in their times. The pejorative overtone associated with them is mostly the making of their critics.

What struck the Sophists was not the abstract ideal of justice or the principle of *isonomia* fathered on the sage Solon, according to which all are equal before the law, but the contradictory practice of tyrants and states: “what is just in Athens is unjust in Sparta, and vice versa”. So, the Sophists scoffed at law publicly and blatantly.²⁷ To avoid the error of oversimplification and misrepresentation of the Sophists, it must be noted that law (*Nomos*) was in archaic thinking the highest human norm, divinely sanctioned and unchangeable. But the laws were so mutable, noted the Sophists. They were the creation of the one or the few who enjoyed political power and used them for their own good. Laws are thus the instrument of domination. Indeed, since all laws are human products, to obey them is like a father obeying his son! Ridiculous! Laws are simply arbitrary impositions. If the state is ruled by one, laws are his caprice; if the state is ruled by many, laws are contrary to nature, being the products of the weak who by political trickery have won power

for the moment but are destined to be overthrown by the intrigue and treachery of those who are weak by nature but become strong through politics. No one with self-respect should obey the laws: they are but agents of alienation! The Sophists of course did not use this term, but said the same thing. "Man is the measure of all things", proclaimed Protagoras. "Justice (*dikaíosúne*) is what benefits the more powerful", said Trasimachus; it only serves the good of someone else (*allotrion agathon*), that is, of the one who commands, but brings harm to the one who obeys.

This wholly negative philosophy of law was countered by Socrates, who discoursed on justice and taught that good citizens should obey even the bad laws of the state, lest bad citizens should disobey also the good laws. The Sophist question was addressed more systematically by Plato, whose *Republic* is the first classical Greek treatise on justice. In this rather juvenile work Plato dreamed of justice as an ideal in an ideal republic. All virtue was to be cultivated through knowledge and education. Hence there was no need for any laws in such a republic or state. A utopian ideal, indeed, too lofty and unrealistic for humans, as Plato learnt both from the experience of life and the realism of his erstwhile disciple Aristotle. In his old age Plato wrote his last and most voluminous work entitled "The Laws", in which he disavowed the thesis of his *Republic* and rehabilitated laws as not only useful but necessary.

Aristotle was not so sanguine as his master, the junior Plato, but more realistic about the role of knowledge to secure virtue and general happiness.²⁸ He took account of the human passions that assail reason and can enslave a person. When perfected, Man is the best of all animals, he noted, but without law and justice he is worse than a beast.²⁹ Aristotle saw law as reason (*lógos*) invested with a coercive force (*anankastiké dynamis*) to keep it from following the wayward passions. This force is supplied by law, in view of securing the good of society organized as a state. In such common good is secured the real good of the individual. Whereas the good of the individual as conceived by the individual had been set up as an absolute by the Sophists, Aristotle inserted the individual in the state conceived as an absolute. Just as the individual is to be led by reason so as not to be enslaved by passions, even so the state is to be led by laws so as not to degenerate into tyranny with the institutionalization of injustice. Laws are, says Aristotle, reason without passion. Aristotle's greatest Christian disciple, Saint Thomas Aquinas,

defined law as *ordinatio rationis*, thus conceiving law as an act of reason (*ratio* = *lógos*) rather than of the will (or caprice, *voluntas* apart from reason), while only implicitly affirming law's specific element of coercibility contained in *ordinatio*, which is to put order or organize efficaciously with the command of the practical reason. Being an "ordinance of reason in view of the common good" law is not in the service of passion or the unreasonable interests of anyone. And common good is not simply the sum total of individual goods but the general condition in which each one as a member of the community can secure his or her good.³⁰

Laws of the state are distinguished from moral laws, norms of ethics, maxims of practical wisdom or counsels, which only advice or invite but do not ensure acquiescence, as law does, with the use of physical force, if need be, so as to obtain the good determined by reason. Precisely for its coercibility, law always has had its opponents and detractors just as it has had its exponents and defenders. The victory of the great struggles for justice like the English Bill of Rights in 1688 establishing guarantees of individual liberties, the American Revolution and independence (1774-1776), the French Revolution (1789), whatever their defects and excesses, were all preceded and accompanied by philosophico-juridical writings. A leading philosopher of law of the twentieth century has written as follows:

Philosophy of law is by its very nature opposed to tyranny, though this, too, has sometimes found therein its theoretical defenders. As in early times Sophocles' Antigone, for example, called upon the "unwritten laws" against the orders of an arbitrary power, so at all times there have been human consciences which asserted and defended the basic idea of pure justice against violence, cloaked though it might be in the forms of legality. A millenary philosophico-juridical tradition teaches the power of the natural law above the positive [law], the immortal principles of human liberty and equality, the cosmopolitan ideal of a *societas humani generis*, the imprescriptible right of every people to resist and to rise against oppressive rulers. So long as there will be oppression of Man by Man, philosophy of law will be always a *philosophia militans*.³¹

Philosophy of law itself is of different hues and schools. While for some law is simply a matter of convention or human making

without any deeper foundation (positivism), at the opposite extreme stands theologism purporting to establish law on the foundation of the will and decree of God. In between are the intermediary theories and schools which found law on utility, history or nature as apprehended by reason. 'Natural law' has been much misunderstood and maligned, but it has still today its competent and courageous exponents.³²

Though law is intimately linked to justice, it can be severed from it and abused. But of course anything good can be abused. And law has often been abused as an agent of power and oppression. It has been in the service not only of just and virtuous sovereigns but of selfish and capricious tyrants. In the history of the Church, too, examples can be cited which include the Inquisition, the burning of witches and heretics, the condemnation of Galileo, and the like—all with due process of law. But that is "only half the story", or perhaps even less than half. Nothing is rightly conceived when regarded exclusively in terms of its history of abuse. Medicine was notoriously abused under Nazism, but medicine is not rated in terms of that abuse. Law is rightly conceived as being in the service of justice. And our age is particularly sensitive to the values of justice and freedom. And this link with justice is the hallmark of law. Justice is the end and the value to secure which law is made or used as a means or instrument. Although open to abuse, law is still the best instrument in human hands to secure justice and is *per se* far from being the agent of alienation. As the Indian sages of old saw, "Law is the king of kings, than whom law is more powerful and exacting; with law as with the aid of a sovereign monarch even the weak can prevail over the mighty."

3. Liberation from Law or Law As Liberating?

Some have detected alienation as implicit in law subjected to the critique of the New Testament. The thesis that those who are "in Christ" are not under the law but are free of law, is the hallmark of Pauline theology. For "Christ is the end of law", as St Paul says (Rom 10:4). "You are not under law but under grace" (Rom 6:14). And again, "if you are led by the Spirit, you are not subject to the law" (Gal. 5:18). "You are called to freedom, brothers and sisters!" (Gal 5: 13). "For freedom Christ has set us free" (Gal 5:1), surely for a freedom from the alienation of law. Once again, although the term alienation is not in the

text, the idea may seem to be implicit. The question then is: whereas in Christ there is liberation from the alienation of law, in the Church with its canon law is there not a return to and consolidation of alienation?

The question is fundamental and cannot be answered fully in a few lines. It was raised already in the apostolic times and has been relayed through the anomeans of old and some Protestant Reformers to certain spiritualists of our own day. The most articulate modern voice has been that of Rudolph Sohm: "there is a contradiction between canon law and the essence of the Church. Everywhere canon law has proved to be an aggression on the spiritual nature of the Church."³³ Sohm has not lacked vocal disciples: "Canon law is the tool of subjection ("unfreedom") and power in the hand of Man."³⁴ It is not by turning a deaf ear to such voices that the Church has issued canons and framed its codes of canon law. Several works of theology of law have appeared in recent years for use as text books in the faculties of canon law,³⁵ although, to the mind of the present writer, no one title can be singled out as a fully satisfactory work for reasons that will be too long to discuss here.

Proof text methodology has had its day and has been found wanting in theology. It should be the same both in attacks against and defence of canon law — what not a few seem to forget.³⁶ The fundamental weakness of such a method in the present case is to interpret the NT texts cited above as a judgement on law as such rather than a theological appraisal of the Mosaic law in the context of the nascent Church. Jesus Christ, "a marginal Jew" of his time, was concerned like all his coreligionists with the law of Moses and its role. His own first concern was to "seek first God's kingdom and His justice" (Mt 6:33) as he asked his disciples also to do. This justice (*dikaíosune*) transcends by far human justice inasmuch as it is the justice of God, who is love. If the commandments and laws of old were presented as the stipulations of the Mosaic covenant and as their applications, the new covenant Jesus inaugurated was not to be their simple abolition but renewal in a new heart vivified by the Spirit and enabling the disciples to live to the full the new law or commandment. If the wise man of the Old Testament had said sagely that as a Man "he is weak and ephemeral, unable to understand justice and laws" (Wisdom 9: 5), the new justice is a mystery revealed in the life, death and resurrection of the Son of God. Jesus' teaching has been summed up by someone in four words: "Make love, not war!" — a twentieth century

parody of his love commandment, "love as I have loved you" (Jn 15:12). As the most recent and authoritative study on the historical Jesus has shown, Jesus was no romantic nor egalitarian Cynic, unconcerned about structures: he clearly provided his renewal movement with structures and powers.³⁷

If on the one hand followers of Jesus were exhorted to live as aliens in an evil world so far as their moral conduct was concerned, they, too, like the other citizens were to "be subject for the Lord's sake to every human institution, whether it be to the emperor as supreme, or to governors as his delegates" (1 Pt 2:13). "Let every person be subject to the governing authorities; for there is no authority except from God" (Rom 13: 1; cf. Tit 3:1). In thus canonizing civil law and enjoining the duty to pay tax like all other citizens, the apostles were surely not introducing alienation ("unfreedom") by the backdoor. Those who theorize an "invisible Church" or a Church run by charisms alone may well be founding a Church of their own inspiration or fancy.

In the Christian community various items of Church order emerged progressively regarding the ministry of the word, baptism, and the Eucharist, articulating the exigencies of the love commandment. An example is the institution of the seven Hellenists to provide for the daily ration to the widows of the Jerusalem community without discrimination on the basis of their Jewish or gentile origin (Acts 6:1-6). The idealized community of "one heart and one soul" (Acts 4:32) was never so ethereal as not to experience the problems of growth beset by divisive forces. Again, when the question regarding circumcision threatened the unity of the Church at Antioch, a solution was to be found collegially in the Jerusalem Council (Acts 15: 1-29), which showed the concrete way of practising "the law of Christ" (Gal 6:2) in a new life context. It was the primordial "apostolic canon" in the service of ecclesial communion, which supplied a model for the development of later apocryphal Apostolic canons as well as synodal or conciliar canons. The authoritative rulings of the apostles, the directives and provisions of synods or councils regarding faith and order as well as the prescriptions of bishops as pastors or "Fathers" in "fulfilling the law of Christ" (Gal 6: 2), came to be called canons, that is "rule" (*regula*) of conduct or "pattern or standard" of Christian faith and Church order.³⁸ The expression "canon law" (*nómos kanónikos*) with this shade of meaning was used in canon 13 of

the first ecumenical council of Nicea (325 A. D.): "Concerning the departing, the ancient canon law (*kanonikòs nómos*) is still to be maintained, namely that those who are departing are not to be deprived of their last, most necessary viaticum."³⁹ Since Nicea I already refers to an "ancient canon law", it is surely anterior to the fourth century, perhaps even reaching back to the times of the post-apostolic writings like *Didache*: the word *kanon* in the sense of "norm," or "rule" or "standard" is found already in the New Testament (Gal 6:16; 2 Cor 10:13-16). Such is the origin of canon law, although some fancy it as a product of the Constantinian Church or as having for its father Gratian, the medieval father of the *science* of Western canon law.

Just as the laws of the Pentateuch did not descend from heaven as codes forged on high but as a matter of history emerged from the life of the People of God across several centuries, so too the laws of the Church are an "evolute" or product of history without prejudice to divine providence or intervention. Hence, for example, procedural laws for ensuring justice in the Church have been influenced by those of civil society. And like the state the Church, too, has exercised the right to defend its unity and integrity using suitable and proportionate means, not excluding penal sanctions like excommunication. Such rights as well as the rights of those guilty of harming the Church's common good are defined by canon law as the rules of Church order. For the Church is not only a mystery but also a social institution. To posit the Church as an institution is not to defend institutionalism, which is the abuse of institutions. Rightly critical of an ecclesiology that is primarily or exclusively institutional, Avery Dulles writes: "I insist that the institutional view is valid within limits. The Church of Christ does not exist in this world without an organization or structure that analogously resembles the organization of other human societies. Thus I include the institutional as one of the necessary elements of a balanced ecclesiology."⁴⁰ As long as the Church lives the dialectics of flesh and spirit and shares in the *schema* of this world,⁴¹ the Church will not only be in need of law but will be in the condition of having to put up with bad laws among good ones, as weeds among wheat in God's kingdom (Mt 13:25,39). Canon law is not identical with the law of Christ. The Church is being built up by Christ while the Church constructs itself and its own structures. And its canon law is like the law of civil society a "social construct", the product of human choices.⁴²

4. Canon Law and the Law of Christ

There seem to be people who are allergic to canon law: they just cannot bear to hear of it or take a close look at it. It is not simply the possible defects of canon law that irritate them — they never acknowledge that a defect a critic sees may sometimes only be in the eye of the beholder — but any canon or law is for them an irritant, however reasonable it be. Different is the case of one who has to accept in faith what one does not and cannot understand fully when the Church stands by a provision of revelation and proposes it without being able fully to understand it or justify it with reason alone. Correlatively, the response expected of the Christian faithful in such cases cannot be a matter of reason alone as the call is to obedience in the darkness of faith. Different is also the case of one who criticises canon law constructively.

But a person who rejects even the reasonable exercise of Church authority and opposes Church legislation “on principle” may in fact be acting out his or her unresolved inner personal conflict. In psychoanalysis, “acting-out” refers to the behaviour of someone who responds to one situation or person under the influence of the affective impulses released from the fixation caused by an unresolved psychic conflict with regard to another situation or person. Thus, for example, a victim of authoritarianism at home or at school may later on as an adult consider unconsciously his or her subjection to a religious superior or bishop or any other authority in the Church or society as the equivalent of that earlier traumatic experience and be unable to accept and integrate law and authority in a mature manner. Such a person is pathetically struggling under alienation. Seen in this light, certain theologies of freedom may be in need of being diagnosed in a psychoanalytic parlour to ascertain first what the author is *acting out*.

Alienation from society, whether imposed upon victims (as in the above instance) or voluntarily chosen (as by the ancient Cynics, notably by Diogenes of Sinope, who lived on the outskirts of Athens, free and naked, like a dog, in a box) does not favour an objective and detached appraisal of society and its laws. Social alienation is different from philosophical epoche. While the latter aims at a neutral perception and unbiased judgment, uninfluenced by extraneous factors, the former is a personal experience that conditions perception and judgment.

The law of the Church cannot be identified tout court with the law of Christ, given the Church's flesh. It would be unrealistic and idyllic to ask that a code of canons of the Church, whether Western or Eastern, be received as being above criticism. When the 1917 Code of Canon Law appeared, it was hailed as a landmark of codification. But its defects emerged gradually, so that in less than fifty years it was decided to replace it. The same is likely to happen to the Latin code of 1983 and the Eastern code of 1990. Already the former has been subjected to much criticism, so that its merits and its defects are seen more clearly; so, too, the latter is open to critical appraisal. The pope is the single legislator of both the codes and has exercised his supreme authority in promulgating them and establishing them on an equal footing but without claiming to put his infallibility behind either code. In so far as canon law is a human product it bears the marks of what is human, weak, limited and mortal. Hence it is only realism to recognize this relative or "human" dimension of canon law. At the same time, like the human being divinised in Christ, canon law has also an absolute or "divine" dimension, which sets it apart from all other kinds of law. To defy the divine, as in the archetypal first Man, is the basic alienation. When rightly understood and used, canon law is a liberating force, an agent of freedom and servant of justice. For it is the rightful ordering of freedom.⁴³

5. Conclusion

"Those who look into the perfect law, the law of liberty... they will be blessed" (James 1: 25). If in Hegelianism, human production leads to alienation, and in Marxism law as a human product is an agent of alienation, in the Christian vision the perfect law is the law of liberty, the agent of liberation.

Canons and codes are of the Church and for the Church. The law of Christ, the *Logos* of God, is the one transcendent but incarnate *Nomos* of the Church. As part of the action of the glorified Lord in the Church through his Spirit lawgiving is vivifying. However, the laws or canons made by the Church are both one with and different from *Logos* and Spirit. Hence they share in the nature of both the Thorah and the Gospel. They are humano-divine in analogy to the incarnate *Logos*, and range on the rungs of a hierarchy of laws. This qualitative difference of canons does not strike the eye in a code in which the canons follow in arithmetical sequence from one to over a thousand.

To neglect the hierarchy of laws by investing all laws with an absolute value, would be to subscribe to nomism (from Greek *nómos*, law) or legalism. In the history of the people of Israel, rabbinism is known for this excess. St. Paul denounced such excess but using the same term for law and legalism, which did not make for clarity. Nomism has afflicted the Church too, generating invariably, by reaction, *anómia* (Greek, no-law), which is the harbinger of anarchy. For an evil at one extreme the opposite extreme often appears as the right remedy, though in fact this may only compound the evil. For nomism, the remedy is not anomism (no-law-ism) but good law.⁴⁴

Just as we started with a citation about "The Joyful Vocation of a Canonist" we may conclude with another about "The Canonist's Vocation and a New Church Order."

The special ministry of the canonist is to secure justice and fairness in the life of the Church. We stand watch to see that everyone and every community in our Church is treated justly and fairly.... We tell people of their rights, and we are to be on the lookout that those rights are respected, whether they are the rights of the bishop, of religious, of parishes, of priests (even "bad priests"), of teachers, and of school children.⁴⁵

The ministry of canon law is a ministry of liberation and of freedom. Law is the safeguard against the hijacking of "freedom by the flesh" (Gal 5:13), although law itself can be abused and be converted into an instrument of alienation. Hence there is need for it to be properly understood, presented and used for liberation. With canon law the Church interprets and articulates the law of Christ, "the royal law" (James 2:8), "the law of liberty" (1:25).

Foot Notes

- 1 Lawrence G. Wren, "The Joyful Vocation of a Canonist," *The Jurist* 58 (1998) 515-525, at p. 520.
- 2 Ibid. p. 521.
- 3 Ibid.
- 4 Ibid. p. 519.
- 5 Cicero, *De amicitia*, 21.
- 6 Celsus, *De medicina*, IV, 2, 2.
- 7 Augustine, *Enarratio in psalmum* 103, sermo 3, 2: "mentis alienatio."
- 8 Nicholas Lobkowicz, "Alienation," *Marxism, Communism and Western Society: A Comparative Encyclopedia*, ed. C.D. Kernig, vol. 1, New York, Herder, 1972, pp. 88-93 at p. 90.

- 9 Note that throughout this article, "man" in the inclusive sense (meaning both the genders of the human being) is written as "Man", even when this is not done in a cited text, as in the present case.
- 10 G. Petrović, "Alienation," *The Encyclopedia of Philosophy*, ed., Paul Edwards, vol. 1, New York-London, Macmillan-Collier, 1967, pp. 76-81, at p. 76.
- 11 G. W. F. Hegel, *Grundlinien der Philosophie des Rechts*, Berlin, 1821, § 29.
- 12 Guido Fassò, *Storia della filosofia del diritto*, 3 vols., Bologna, Il Mulino, 1972, I: 99-118, at p. 118.
- 13 G. Petrović, "Alienation," op. cit. (n. 10), p. 77.
- 14 Marx-Engels, *Werke 1-39*, [MEW], ed., Institut für Marxismus-Leninismus, Ostberlin, 1956-1968. See vol. 23, pp. 504-505.
- 15 MEW 4, *The Manifesto of the Communist Party*, p. 477.
- 16 MEW 6, p. 245.
- 17 MEW 3, *Die deutsche Ideologie*, p. 190; trans., *The German Ideology*, Moscow, 1964.
- 18 Ibid., p. 35.
- 19 Karl Marx, *Economic and Philosophic Manuscripts of 1844*, trans. Martin Milligan, London, 1959.
- 20 MEW 4, *Manifesto of the Communist Party*, II, p. 482.
- 21 "Symposium on Alienation and the Search for Identity": *American Journal of Psychoanalysis*, 21:2 (1961).
- 22 Melvin Seeman, "On the Meaning of Alienation," *American Sociological Review*, 24 (1959) 783-791.
- 23 Eric Josephson and Mary Josephson, eds., *Man Alone: Alienation in Modern Society*, New York, 1962; Gerald Sykes, ed., *Alienation: The Cultural Climate of Our Time*, 2 vols., New York, 1964.
- 24 Karl Marx with Friedrich Engels, *Basic Writings on Politics and Philosophy*, New York, 1959, p. 244.
- 25 Note that Marx wrote a tract called *The Misery of Philosophy* (against Proudon, in French, Paris, 1847).
- 26 *Satapatha Brahmana* XIV, 4.2.26 : "Tadetat kshatrsya kshatram yaddharmah tasmāt dharmatparannasti athovalīyannavalīyan samashante dharmena." Law is praised as an ally of justice and defender of the weak, who can with its aid overcome the machinations of the mighty. Like the Old Testament term *thorah*, the word *dharma* used in the ancient Indian texts and rendered here with *law*, has a richer density of meaning than "law" understood in a merely juridical or forensic sense.
- 27 On the Sophists, see Georg B. Kerferd und Hellmut Flashar, "Die Sophistik," in *Sophistik, Sokrates, Sokratik, Mathematik, Medizin*, ed. Hellmut Flashar, (*Grundriss der Geschichte der Philosophie. Die Philosophie der Antike*, Band 2/1), Basel/Stuttgart, Schwabe, 1998, pp. 1-137. Citation on p. 12.
- 28 On Aristotle, see Hellmut Flashar, ed., *Ältere Akademie, Aristoteles, Peripatos*, (*Grundriss der Geschichte der Philosophie. Die Philosophie der Antike*, Band 3), Basel/Stuttgart, Schwabe, 1983, pp. 175-457.
- 29 Aristotle, *Politics*, Bk I, (n. 1253).
- 30 "... definitio legis, quae nihil est aliud quam quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet promulgata" (S. Th. I-II, q. 90, a. 4): "a kind of ordinance of reason for the common good, made by him who has the care of the community, and promulgated." See Susan Dimock,

- "The Natural Law Theory of St. Thomas Aquinas," in *Philosophy of Law*, 6th ed., eds., Joel Feinberg and Jules Coleman, (Belmont, CA: Wadsworth, 2000), pp. 19-32.
- 31 Giorgio Del Vecchio, *Lezioni di Filosofia del Diritto*, 13 ed., Giuffr , Milano, 1965, pp. 194-195; trans. of 8 ed., Thomas Owen Martin, *Philosophy of Law*, Washington, D.C., The Catholic University of America Press, 1953, p. 5.
 - 32 For a succinct general exposition see Brian Bix, "Natural Law Theory," in *Philosophy of Law*, 6th ed., eds., Joel Feinberg and Jules Coleman, (Belmont, CA: Wadsworth, 2000), pp. 7-18; see also Robert P. George, ed., *Natural Law Theory*, Oxford, Clarendon Press, 1992; idem, *The Clash of Orthodoxies: Law, Religion and Morality in Crisis*, (Wilmington, Delaware: ISI Books, 2001); Ronald Dworkin, *Law's Empire*, (Cambridge, Mass.: Harvard University Press, 1986).
 - 33 Rudolph Sohm, *Kirchenrecht I* (Systematisches Handbuch der deutschen Rechtswissenschaft, 8), Leipzig, 1892: "Das Kirchenrecht steht mit dem Wesen der Kirche in Widerspruch....  berall hat das Kirchenrecht sich als einen Angriff auf das geistliche Wesen der Kirche erwiesen" (p. 700).
 - 33 Joseph Klein, *Skandalon. Um das Wesen des Katholizismus*, T bingen, 1958: "Werkzeug der Unfreiheit und Gewalt in der Hand des Menschen" (p. 119).
 - 35 The latest is P ter Erd , *Theologie des kanonischen Rechts: Ein systematisch-historischer Versuch* (Kirchenrechtliche Bibliothek, 1), M nster, Lit, 1999, (Bibliography, pp. 195-213).
 - 36 It may be apposite to cite here the words of Brhaspati (*Sacred Books of the East*, vol. 33):
 Kevalam  stram ritya
 na kartavyo hi nirnayah;
 Yuktih ne vic re tu /
 dharmah ni praj yate.
 "Duty is not defined merely on the basis of scientific texts. By such procedure without the use of reason injustice is engendered."
 - 37 John P. Meier, *A Marginal Jew*, vol. 3, New York, Doubleday, 2001.
 - 38 Heinz Ohme, *Kanon ekklesiastikos: Die Bedeutung des altkirchlichen Kanonbegriffs*, Berlin-New York, W. De Gruyter, 1998.
 - 39 Norman P. Tanner, ed., *Decrees of the Ecumenical Councils*, vol 1, Sheed and Ward, 1990, p. 12; Joannou, I, 1, p. 26.
 40. *Models of the Church*, Doubleday, New York, 1974, p. 8.
 41. *Schema* is a Pauline term, meaning the external, changeable form of the world, or the world phenomenon; see 1 Cor 7:31.
 42. Peter Berger and Thomas Luckmann, *The Social Construction of Reality*, Garden City, Doubleday, 1966, 56-58.
 - 43 E. M. Maier, "Kirchenrecht als christliche Freiheitsordnung," * sterreichsches Archiv f r Kirchenrecht* 35 (1985) 282-311; Andr  Gabriels/Heinrich J. F. Reinhart (eds.), *Ministerium Iustitiae*, (Festschrift, Heribert Heinemann), Essen, 1985.
 - 44 George Nedungatt, *The Spirit of the Eastern Code*, (Rome: CIIS; Bangalore: Dharamaram Publications, 1993), pp. 24-25.
 - 45 James A. Coriden, "The Canonist's Vocation and a New Church Order," *The Jurist*, 51 (1991) 67-80, at p.69.

Laws – Medicinal or Punitive?

Canons on Penal Sanctions in the Code of Canon Law (CIC) and Code of Canons of the Oriental Churches (CCEO)

Jose Porunnedom

Laws, especially penal laws, in the Church are to be understood as having the same finality as that of the Church herself, namely the salvation of souls. At the same time to the uninitiated, laws may appear to be too abstract and rigid. It is the responsibility of those who are called to apply laws in concrete situations to interpret the apparently abstract and rigid laws in the right spirit and to apply them correctly. Delicts (offences) in the Church are considered to be sicknesses and consequently penalties for them are medicinal rather than purely punitive. Moreover, penalties are the extreme form of medication and therefore persons in authority are to make use of them only in extreme cases and that too when all other means fail. Laws in the Church do have a human face, but incorrect interpretation and inappropriate application make them appear less human. Dr. Jose Porunnedom, Chancellor, Major Archiepiscopal Curia, Kochi-682 081, Kerala, India.

Introduction

The question whether the laws on penal sanctions in the Church are medicinal or punitive is very pertinent. It is another way of asking what the purpose of these laws is. In order to know the purpose of laws, be they penal or otherwise, in the Church one need to have a clear idea about the nature and purpose of the Church. Even though Church is composed of physical persons and has a physical structure it is not merely a physical society just as a state. In the words of Pope Paul VI: “the Church, as a society, is not exactly the same as a civil society. It is unique and singular because, by virtue of its specific goal and the means

it uses to reach this goal, it is supernatural and spiritual society".¹ It is a spiritual and supernatural society but with a corresponding physical basis. The Pope says again: Church's "original reason for being ... is that of service".² It is established for "the guidance and salvation of the people of God".³ That is to say, the purpose of its existence is spiritual. The purpose of the laws of the Church also has this supernatural and spiritual aim. Therefore Pope Pius XII said: "Canon law likewise is directed to the salvation of souls; and the purpose of all its regulations and laws is that men may live and die in holiness given them by the grace of God".⁴

The penal laws of the Church are no exception to this general rule. In the eyes of the Church delicts are illnesses to be cured or prevented. Consequently punishments are to act as curative or preventive means. In other words they have a medicinal or therapeutic purpose, namely to heal the wounds caused by the perpetrators of delicts to themselves as well as to the faith community that is the body of the Church and to act as a deterrent. Nevertheless, the popular impression is that laws, especially the penal laws, in the Church do not have a human face. Its reason is to be found primarily in the attitude of the persons who are called to apply the laws, especially those in authority and those who sit in judgement in the ecclesiastical tribunals. This article is an effort to expose the less-known human face and medicinal dimension of the laws, especially the penal ones, of the Church as they are given in the *Code of Canon Law* (CIC) and the *Code of Canons of the Oriental Churches* (CCEO). It may, nevertheless, be noted that the present article does not pursue a detailed analysis of the canons themselves but makes a general exposition of the spirit and the guiding principles behind the drafting of the related canons.

Vatican II and the Rediscovery of the Spiritual Nature of the Church

It is true that in the Western Church for many centuries the supernatural and spiritual nature and purpose of the Church was in oblivion. In the aftermath of the total break between the Western and the Eastern Churches and the ascendancy of the Bishop of Rome to the absolute political and religious leadership there developed in the West the notion of the Church as a *perfect society* and a *Christian republic* with all its practical conclusions.⁵ Such a development together with

the Roman legal tradition pushed into oblivion the notion that the Church is a faith community and that its legal system, the laws and the jurisprudence, must conform to its supernatural and spiritual nature and purpose. The love of the Western legal system for precision through definitions and limitations made it apparently a rigid one in the hands of those who applied them to concrete situations.⁶ Though in the Eastern Churches there was a different legal tradition it could not influence much the legal system of the Western Church which became *the* legal system of the Catholic Church owing to historical reasons.⁷

Fortunately the Second Vatican Council rediscovered the original nature and purpose of the Church as one can see from *Lumen Gentium*, the Dogmatic Constitution on the Church (LG). According to the Council the Church by nature is a sacrament, that is a sign and instrument, of communion with God and of unity among all men (LG 1). It is the mystery of Christ unfolded in time and space (LG 3). The Church endowed with the gifts of her founder and faithfully observing his precepts of charity, humility and self-denial, receives the mission of proclaiming and establishing among all peoples the kingdom of Christ and of God, and she is on earth, the seed and the beginning of that kingdom (LG 5). The Church is a sheepfold, although watched over by human shepherds are at all times led and brought to pasture by Christ himself...The Church is a cultivated field entrusted to the cultivators (LG 6). She is the Jerusalem whom Christ loved and for whom he delivered himself up that he might sanctify her (Eph. 5:26). It is she whom once purified, he willed to be joined to himself, subject in love and fidelity (Eph. 5:24) and whom he filled with heavenly gifts for all eternity, in order that we may know the love of God and of Christ for us, a love which surpasses all understanding (Eph. 3:19). The following description of the Church in *Lumen Gentium* deserves special mention:

The one mediator, Christ established and ever sustains here on earth his Holy Church, the community of faith, hope and charity, as a visible organization through which he communicates truth and grace to all men. But, the society structured with hierarchical organs and the mystical body of Christ, the visible society and the spiritual community, the earthly Church and the Church endowed with heavenly riches, are not to be thought of as two realities. On the contrary they form one complex reality which comes together from

a human and a divine element. For this reason the Church is compared, not without significance, to the mystery of the incarnate Word. As the assumed nature, inseparably united to him, serves the divine Word as a living organ of salvation, so, in a somewhat similar way, does the social structure of the Church serve the Spirit of Christ who vivifies it, in the building up of the body (Eph. 4: 15 - LG 8).

It was obvious that the laws of the Church also had to be revised in conformity with these rediscovered ecclesiological notions. Therefore

the process of revision was not simply a reformulation and refinement of canonical principles but a redrafting and reform of ecclesial structures and norms. Thus, the close connection between legal reform and Vatican II is a very important factor to bear in mind when studying the Code. It means that the canons, many of which repeat or summarize the Council's texts, must be interpreted in the light of its teaching; they cannot properly be isolated from their historical sources.⁸

Pope John Paul II, when speaking to the final plenary meeting of the Pontifical Commission for Revision of CIC, underlined the relationship of the Council to the Code:

The new Code, therefore was conceived (by Pope John XXIII) along with the Council, and from the very beginning the Code was intimately joined to the Council. As a matter of fact the Council Fathers themselves were conscious during their deliberations that there would be a new Code, and provided subject matter and directive guidelines for it. In their mind the Code should be the fruit of the Council, or better, an instrument for carrying out its decision and for realizing its desired fruits.⁹

In the Apostolic Constitution *Sacri; Disciplinae Leges* promulgating the *Code of Canon Law* (CIC) the Pope wrote:

The instrument, such as the Code is, fully accords with the nature of the Church, particularly as presented in the authentic teaching of the Second Vatican Council seen as a whole, and especially in its ecclesiological doctrine. In fact, in a certain sense, this new Code can be viewed as a great effort to translate the conciliar ecclesiological teaching into canonical terms. If it is impossible perfectly to transpose the image of the Church described by the conciliar doctrine into canonical language, nevertheless the Code must always be related

to that image as to its primary pattern, whose outlines, given its nature, the Code must express as far as possible (Para. 17). Hence flow certain fundamental principles by which the whole of the new Code is governed, within the limits of its proper subject and of its expression, which must reflect the subject. Indeed it is possible to assert that from this derives that characteristic whereby the Code is regarded as a complement to the authentic teaching proposed by the Second Vatican Council and particularly to its Dogmatic and Pastoral Constitutions (Para. 18).

He wrote in *Sacri Canones*, the Apostolic Constitution by which he promulgated the *Code of Canons of the Eastern Churches* (CCEO):

The *Code of Canons of the Eastern Churches* which now comes to light must be considered a new complement to the teaching proposed by the Second Vatican Council, and by which at last the canonical ordering of the entire Church is completed (Para. 17)

Since the new Codes are the canonical expressions of the teaching of the Second Vatican Council, especially its ecclesiological vision, the canons of the Code must reflect that teaching. In fact “the ties between the Council and the Code are many, and the canons must be viewed, understood and applied against the background of the Council. It is in the documents of the Council that the true and full meaning of the canons will be found.”¹⁰ In this regard Pope Paul VI speaks of a “new way of thinking” (*novus habitus mentis*) proper to the Council which was to direct the revision of the law and serve as the key to its meaning.¹¹ In fact several of the canons both in the CIC and in CCEO are verbatim taken from the documents of the Second Vatican Council.¹² Therefore it is in those documents that one has to look for the true background, context and meaning of the canons.

Need and Purpose of Laws in the Church

As it has already been stated the Church is not only a spiritual but also physical society because it is composed of physical persons and endowed with visible structures. Having both supernatural and natural structures and being composed of individuals with varying degrees of imperfections Church needs laws, including penal ones, to regulate the life of its members and to lead them to their ultimate aim. The attitudes and actions of the bad ones will at times disturb the peace and order of the community and bring the offenders into conflict with those in

authority who have a special responsibility to protect the integrity of the community's faith, communion and service. It can also be that the very authority who are to apply the rules correctly, turns out to be their violators. Therefore clear rules and regulations are a necessity in the Church. Pope John Paul II writes in his Apostolic Constitution *Sacri Disciplinae Leges*:

Since the Church is established in the form of a social and visible unity, it needs rules, so that its hierarchical and organic structure may be visible; that its exercise of the functions divinely entrusted to it, particularly of sacred power and of the administration of the sacraments, is properly ordered; that the mutual relationships of Christ's faithful are reconciled in justice based on charity, with the rights of each safeguarded and defined; and lastly, that the common initiatives which are undertaken so that Christian life may be ever more perfectly carried out, are supported, strengthened and promoted by canonical laws (Para. 23)

The incorrect attitudes and actions of the bad members of the Church, including those in authority, may at times constitute delicts which need special treatment called punishments. Laws on penal sanctions give the authorities the necessary legal framework to restore peace and order in the community and to reintegrate the offending party within the life of the community.

This challenge to resolve conflicts arising from the breaches of public order is common to Church and state; hence there are certain similarities between ecclesiastical and civil penal law. However, the Church's salvific finality gives to its penal order a distinct character that should not be lost sight of.¹³

In other words the purpose of all laws in the Church, including the penal laws, is to help its members attain eternal salvation. Because of this salvific finality of the Church purely penal laws have hardly any place in the ecclesiastical legal system. The distinctness of the penal laws of the Church is said to be their medicinal purpose.

Medicinal Dimension of Penal Sanctions in the Church

The underlying notion behind the expression medicinal is that delict is an illness that is either to be cured or to be prevented. So punishment has both a curative and a preventive purpose. Not only the curative

aspect but also the preventive nature of penalties is important. Nevertheless, punishment is considered to be the ultimate form of treatment. Penal laws contain the prescriptions and methods of this treatment. Penalty being the extreme form of medication penal sanctions are to be made use of only in desperate cases and with extreme care so that they may not harm the patient or the community and should not have side effects.

In the Church, especially in the East, there is a long tradition of considering ecclesiastical offences as illnesses and punishments as medicine. Canon 102 of the Council of Trullo (AD 698) while warning the erring bishops says:

It behoves those who have received from God the power to loose and bind, to consider the quality of the sin and the readiness of the sinner for conversion, and to apply medicine suitable for that disease, lest if he is injudicious in each of these respects he should fail in regard to the healing of the sick man. For the disease of sin is not simple, but various and multiform, and it germinates many mischievous offshoots, from which much evil is diffused, and it proceeds further until it is checked by the power of the physician. Wherefore he who possesses the science of spiritual medicine ought first of all to consider the disposition of him who has sinned, and to see whether he tends to health or (on the contrary) provokes to himself disease by his own behaviour, and to look how he can care for his manner of life during the interval. And if he does not resist the physician, and if the ulcer of the soul is increased by the application of the imposed medicaments, then let him mete out mercy to him according as he is worthy of it. For the whole account is between God and him to whom the pastoral rule has been delivered, to lead back the wandering sheep and to cure that which is wounded by the serpent; and that he may neither cast them down into the precipices of despair, nor loosen the bridle towards dissolution or contempt of life; but in some way or other, either by means of sternness and astringency, or by greater softness and mild medicines, to resist this sickness and exert himself for the healing of the ulcer, now examining the fruits of his repentance and wisely managing the man who is called to higher illumination. For we ought to know two things, to wit, the things which belong to strictness and those which belong to

custom, and to follow the traditional form in the case of those who are not fitted for the highest things, as holy Basil teaches us.¹⁴

The Council of Trent (1545-1563) which brought in a certain sense over-juridism in the Church has a similar decree. The decree on reforms in the Church passed in the 13th session says:

...First of all, the council judges they (bishops) should be reminded that they are shepherds and not oppressors (1Pt. 5, 2-4; 1 Tm. 3, 2-4; Tt. 1, 7-9) that they are to preside over their subjects but not lord it over them: they are to love them as children and brothers, and take pains by exhortation and counsel to deter them from what is unlawful so that they may not be obliged, when they do wrong, to restrain them by appropriate penalties. Concerning those, however, who through human frailty have chanced to fall into sin, that precept of the Apostle has to be kept: that they reprove, beseech and rebuke them in all goodness and patience (2 Tm. 4, 2) since often kindness towards those to be corrected is more effective than severity, exhortation more than threat, charity more than command. But, since it is the duty of an attentive and kind shepherd first to apply gentle medicine to the ailments of the sheep, if there is need for seriousness of the rod because of the wrong done, then strictness should be tempered with restraint, judgement with mercy, severity with lenity, so that the discipline which is salutary and essential for the people may be kept without harshness, and those who have been corrected may improve; or, if they refuse to repent, others may be deterred from faults by the salutary example of the punishment imposed. Later, when the seriousness of the malady may so demand it, it is for the shepherd to proceed further, to harsher and weightier remedies; and if even these measures are not effective, to ensure that those at fault are removed, so that he at least frees the other sheep from the danger of contagion.¹⁵

It is important to note that the decree is about the reform of the life of bishops who at that time might not have been in all cases leading an exemplary life in conformity with their ecclesiastical dignity. So the council is reminding them to carry out their duties in accordance with the teaching of the apostles and fathers of the Church, especially in their dealings with their subjects. In other words what the bishops were doing in applying the law of the Church was not according to the spirit

of those laws. The law with a human face were getting dehumanized in the hands of those erring bishops.

Canon 2214 #2 of the CIC 1917 is a partial quotation of this decree of the Council of Trent. It is the first canon in the Second Part of the Code which is on penal sanctions. Section I of this title is on penalties in general and the said canon is the first one. That way it gives a general directive to the judge for the application of the canons that followed. The canon begins by saying "therefore the warning of the Council of Trent contained in session XIII, chapter 1, decree on reform may be kept before the eyes". Obviously the legislator reminds the judges, especially the bishops, that they are to constantly remind themselves of the teaching of the apostles and about the purpose of penal sanctions in the Church. Given its importance we shall quote the canon in its entirety:

Bishops and other Ordinaries should remember that they are shepherds and not slave-drivers (1 Pt. 5, 2-4); 1 Tim. 3, 2-4; Tt. 1, 7-9), and that they must rule over their subjects as not to domineer over them but to love them as sons and brothers; they should endeavour by exhortation and admonition to deter them from wrongdoing lest they be obliged to administer due punishment after faults have been committed. Yet if through human frailty their subjects do wrong, they must observe the precept of the Apostles, and reprove, entreat, rebuke them in all patience and doctrine; for sympathy is often more effective for correction than severity, exhortation better than threats of punishments, kindness better than insistence on authority. If in view of the seriousness of a crime there be need of punishment, then they must combine authority with leniency, judgement with mercy, severity with moderation, to the end that discipline, so salutary and essential to public order, be maintained without asperity, and that those who have been punished may amend their ways, or if they refuse to do so, that others may be deterred from wrongdoing by the salutary example of their punishment.

Going through the abovementioned canons and the decree of the Council one can hardly accuse law of having an inhuman face. But the clue to the reason for the accusation is in the decree itself. It is because of the selfishness of the authorities who consider their subjects as slaves or as their possessions, and whom they make use of for their selfish ends. In the hands of such authorities law puts on an inhuman face and

becomes an instrument of oppression rather than of salvation and liberation. In the case of penal laws the situation can be much worse.

Canons on Penal Sanctions in 1983 CIC

It is true that a canon similar to that of canon 2214 #2 of 1917 CIC did not find its way into the 1983 CIC. It is not because that the Commission wanted to abandon the canon but it was to "avoid or rather keep out of the revised Code of Canon Law any concepts, expressions, or suggestions recently spread abroad in various writings, according to which the future Code would have to have as its principal end solely the regulation of faith and morals". In fact many critiques of the original schema of the canons on Penal Sanctions in CIC had suggested that the canons express the rationale for penal law. But because of the general reluctance of the Commission for the Codification to deal with the foundational theologico-legal issues the suggestion was not accepted.¹⁶ According to the Principles for the Revision of CIC

the principal and essential object of Canon Law is to determine and to safeguard the rights and obligations of each individual person with respect to the rights and obligations of others and of society at large, and certainly this can be done in the Church in all that pertains to the worship of God and the salvation of souls.¹⁷

It is also worth mentioning the observation of the Synod of Bishops held from 29 September to 29 October about the penal laws in the Church. The Synod said: "Ecclesiastical penalties should be kept to a minimum and their remission limited to the external forum. In general, most penalties should be *ferendae sententiae*, i.e., requiring an authoritative decision for imposition. Automatic penalties (*Latae sententiae*) should be reduced to the smallest possible number and restricted to the most serious of matters".¹⁸

Even though a canon similar to canon 2214 #2 of 1917 CIC is absent in 1983 CIC its spirit permeates the entire Code especially in the canons on trial and punishments. Care has been taken to ensure that none is punished unjustly and without giving the accused a chance to defend himself. The drastic reduction of the number of *latae sententiae* penalties and the preference given to judicial process rather than administrative procedures is also proof of this characteristic of the Code. In the case of punishments it is said in CIC canon 1341:

Only after the (Local Ordinary) has ascertained that scandal cannot sufficiently be repaired, that justice cannot sufficiently be restored and that the accused cannot sufficiently be reformed by fraternal correction, rebuke and other ways of pastoral care is the ordinary then to provide for a judicial or administrative procedure to impose or to declare penalties.

Since the penal laws in CIC cannot be understood properly without going into the history of these canons it can reasonably be assumed that the canon cited above contains the spirit of canon 2214 #2 of the 1917 CIC as well as of the teaching of the Second Vatican Council. It is clear from the Guidelines for the Revision of the Code as well as from the canons themselves. It is said in the introduction of the Guidelines: "The principles proposed in this present document for the revision of the Code of Canon Law are the fruit of careful study and attentive consideration given to the Decree of Vatican II".¹⁹ Guideline No. 3 says:

The sacred and organically structured nature of the Church as a community manifests that the juridic character and all the institutions of the Church exist for the purpose of promoting a supernatural life. Hence the juridic ordering of the Church, with the laws and precepts, rights and duties, which flow from it, must be in accord with the supernatural end or purpose of the Church. For law, in the mystery of the Church, takes on the nature of a sacrament or sign of the supernatural life of the Christian faithful; it signifies that life and promotes it. Of course, not all juridic norms are aimed directly toward a supernatural end or at directly promoting pastoral care. Yet it is necessary that the Church's law be in harmony with the attainment of the supernatural end by all men. Hence, the laws of the Code of Canon Law must shine forth with the spirit of charity, temperance, humaneness, and moderation, which as so many supernatural virtues distinguish the laws of the Church from every human or profane law. In establishing law, the Code of Canon Law must foster justice as well as a wise equity, which is the fruit of kindness and charity; and in order to foster these virtues, the Code must seek to arouse the discretion and knowledge so necessary for pastors and judges.²⁰

Guideline No. 9 is about safeguarding the rights of persons in the Church:

A very important problem must be solved in the future Code of Canon Law, namely, how can the rights of persons be defined and safeguarded? ... The use of this power in the Church, however, must

not become arbitrary, because natural law prohibits such arbitrary use of power, as do also positive divine law and the law of the Church itself.²¹

With regard to the procedure for protecting subjective rights Guideline No. 7 says:

Nor is it enough to say that the safeguarding of human rights is adequately provided for in our legislation. We must also acknowledge the truly personal subjective rights, without which a juridically organized society cannot be imagined. In Canon Law we must, therefore proclaim that the principle of the juridical protection of rights applies with equal measure to superiors and subjects alike, so that any suspicion whatsoever of arbitrariness in Church administration may completely disappear. This can only be brought about by means of recourses wisely provided for by the law, so that if anyone thinks that his rights have been violated at a lower instance, he can effectively have them restored in a higher instance. Although it is generally thought that recourses and judicial appeals are sufficiently provided for in the Code of Canon Law according to the demands of justice, it is nevertheless the common opinion of canonists that administrative recourses are still lacking considerably in Church practice and in the administration of justice. Hence the need is everywhere strongly felt to set up in the Church administrative tribunals of various degrees and kinds, so that the defense of one's rights can be taken up in these tribunals according to proper canonical procedure before authorized officials of different ranks.²²

In short the intention of the Commission was to make a Code which would contain norms with a human face and which would really act as a liberative and salvific force within the Church. Especially in the laws concerning trials and punishments one can see that every care has been taken to ensure justice and protection of rights in such a way that they really are medicinal and not merely punitive.²³

Penal Laws in CCEO

Unlike the Commission for the Revision of CIC the Commission for the Revision of the Oriental Code expressly opted for including a canon similar to that of canon 2214 #2 of 1917 CIC. The Commission was certainly aware of the position adopted by the Commission for the Revision of CIC. The reason for adopting this opposite position was "the fidelity to the tradition of the Oriental Churches."²⁴ In the

Guidelines for the Revision of the Oriental Code we read:

The Oriental Code should draw its inspiration from, as well as express, the common discipline, such as it is contained: a) in the Apostolic tradition; b) in the Oriental canonical collections and in the customary norms common to the Oriental Churches and not fallen into desuetude.²⁵

Special care must be taken in the drawing up of laws so that the new Code reflect a concern not only for justice but also for that wise equity which is the fruit of understanding and charity: indeed the Code must be such as to encourage pastors to practise these virtues with discretion and intelligence. The canonical norms, therefore should not impose obligations when instructions, exhortations, suggestions and similar acts by which communion among the faithful is fostered, are sufficient for the better attainment of the Church's purpose.²⁶

With regard to penalties in general the Guideline says:

It is well-known that the Pontifical Commission for the Latin Code has already operated a reduction of the penalties *latae sententiae* in the draft of the canons. In the Oriental Code all the *poenae latae sententiae* should be abolished, because they do not correspond to the genuine Oriental traditions, are unknown to Orthodox Churches, and do not seem necessary for the purpose of adaptation of the Oriental Code to the present-day requirements of the discipline of the Oriental Catholic Churches. Greater weight must be given to the *monitio canonica* before proceeding to inflict penalty, according to the ancient Oriental canons. It is proposed to revise the concept of canonical penalty as a *privatio alicuius boni*. For, it would seem, the canonical penalty be also an *impositio actus positivi*. It is true that, in this case, it would be more correct to designate penalties as *poenitentiae* rather than as *poenae*. Nevertheless, this would be more in keeping with the ancient and salutary Oriental discipline. It is worth noting that today, even in the Orthodox Churches, the *poenae* are all *privatio boni*.; but the Orthodox would also admit that the ancient discipline almost invariably contained a double element in *poena*: the *privatio boni* and the imposition of a positive act. Today, of course, similar public penances can be imposed. Still, the attempt should at least be made to envisage the possibility of introducing into the penalties also a positive element which would better

correspond to their medicinal character, - a character that is practically the only one the Christian East acknowledges in canonical punishments.²⁷

The sub-committee that was constituted under the Commission to draft the canons on delicts in its sittings on 18 and 23 November 1974 studied the general thrust of the future canons on delicts. The sub-committee noticed that the Council has used just twice the word delicts while the hierarchical structure of the Church requires also the provision for canonical punishments elaborately. However the sub-committee understood that it was "for building up and not for destroying" (2 Cor. 13:10).

In conformity with the position adopted by the Commission the following canon was included in the new Code:

Since God employs every means to bring back the erring sheep, those who have received from him the power of loosing and binding, are to treat appropriately the illness of those who have committed offences, by correcting, reproving, appealing, constantly teaching and never losing patience, and are even to impose penalties in order to ensure that the wounds inflicted by the offence may receive a cure and to preclude the offender from being given to dissoluteness of life and contempt of law (CCEO, c. 1401).²⁸

It is significant that this theological canon makes an effort to say what the purpose of the penalties in the Church is. Borrowing the idea of St Paul (2 Tim. 4, 2) and supported by a number of Church Fathers and the magisterium the canon says that since God employs every means to bring back the erring sheep, those who have received from heaven the power to loose and bind (that is the authorities in the Church) are to apply suitable medicine to the sickness of those who have committed delicts. Committing a delict is seen as an act of erring by the sheep and imposing penalties on those who err as bringing back the sheep to the fold. In other words penalties in themselves are not permanent in nature. Once the erring sheep comes back to the fold the penalty ceases to have its hold. According to the canon "suitable" medicine is to be applied. In order to apply the suitable medicine the doctor first of all should make the proper diagnosis and must be thorough with the medicines. The doctor is to know also the past history of the patient. It is a very grave responsibility on the part of the pastors of the Church.

The canon again quoting St Paul describes how this should be done. It is by reproving, imploring and rebuking the erring sheep with greatest patience and teaching. A punishment is to be given only if reproving, imploring and rebuking have been ineffective. Prejudices have no place here. Patience involves the finest of human qualities and teaching involves erudition and knowledge in matters of faith and morals. According to the canon the pastors are supposed to be very good at interpersonal relationships. The canon does not exclude even imposing of penalties to bring back the erring sheep. But the aim of such punishments is to heal the wounds caused by the delict especially in the community, that is, the ecclesial body. The penalties are to be imposed whenever they are needed so that those who commit delicts are not driven to the depth of despair nor are restraints relaxed into dissoluteness of life and contempt of law. Penalty is a sure means for the guilty to know whether his delict is remitted or recompensed. Similarly it is a warning to others in the community and a deterrent to others committing delicts. Unless there are some such deterrents life in the community may fall into a chaotic state.

As medication is not to be used to kill people but to give them life penal laws are to give fresh life to those on whom they are applied. Just as in the case of a medical practitioner incompetence and ignorance as well as arrogance and selfishness and greed on the part of those who handle penal laws can be fatal to those to whom they are applied. A thorough knowledge of the letter and spirit of penal laws is a necessary pre-condition for all those who are called to apply them.

In conformity with the Guidelines in CCEO there is no more *latae sententiae* punishments.²⁹ As already stated the rationale behind this abolition is that it is unknown to the Christian East.³⁰ It is also because of the conviction that every one has a right to be heard before being punished. For the same reason CCEO prefers judicial to administrative procedure in the matter of punishments.

Pastoral Application of CIC and CCEO

It is beyond doubt that both the Codes are eminently pastoral in nature. The Guidelines for the Revision of both Codes expressly state that the future Codes must be given a pastoral character.³¹ Nevertheless, they do maintain also their juridical nature as texts of legal ordering. Nevertheless, unlike the civil Codes, the Codes of Canon Law contain

mainly the juridical principles that do not change easily. As a consequence they tend to be abstract and very rigid. Therefore

the canons are marked by a certain abstractness – even artificiality. In a way, all forms of law are artificial, but canon law seems, by its conciseness, to highlight this characteristic. In the concrete, therefore it seems, it often admits of varying interpretations and applications. An exclusively literal reading can be especially risky in canon law. Proper interpretation may sometimes be rather complex, and yet, an involved administrator, rather than an independent judge, is required to make that interpretation and apply it. In general, the Code tends to be theoretical and abstract rather than empirical. It is founded on the experience of faith and relies on revealed teaching, but it tends to express the norms that are needed for Church order in a formalistic manner. This style must be clearly understood if the law is to serve as a source of both stability and growth.³²

The canons of the Codes are like a medical concentrate. A medical concentrate is not to be administered to the patients in its pure form because in that form it is likely to harm or even kill the patient rather than cure him. Therefore a physician has a grave duty to know thoroughly its composition, properties and manner of its administration to the patients. He should be able to dilute it using the right material and in the right proportion depending on the nature of the disease and the age and condition of the patient. Similarly it is the duty of all those who are called to handle the laws in concrete pastoral situations to know the letter and spirit of the laws in the Church and to administer them in the right measure depending on the condition of the souls who are entrusted to their care. To the uninitiated in canon law its

concise principles can seem rather stark and unyielding unless the administrator is sensitive to their role in ecclesiastical governance and the obligation to interpret and apply them properly. A proper attitude toward canon law is not an easy task for those who find themselves with one foot in the world of civil law and the other in that of canon law. Somehow, aware of the similarities and differences of both juridical “languages” they must have the talent and patience to walk a fine line between lawlessness and rigidity if they expect the Code to be an effective element of pastoral life. In short, they must become juridically learned in their ecclesial field and fully

responsible in the exercise of administrative discretion.³³

In other words the administrator is called upon to humanize and accommodate the legislator's canonical principles, set them in their proper context, apply them equitably, and dispense from them wherever pastorally necessary.³⁴

All those who are in authority have in some measure to deal with the laws. They include right from the Roman Pontiff to the local superior of a religious house to the parish priest in charge of the smallest parish. Each in his or her own measure is to deal with the law. Whether the human face of the law is retained will depend on their decisions. This is no where more conspicuous than in the penal sanctions, for

penalties are intended to help Christians appreciate the disparity between their attitudes and actions and the values of the Gospel proclaimed by the Church. In this sense, penalties are meant to be tools of the external forum to bring about personal repentance and reconciliation with the community.³⁵

Exhorting ecclesiastical judges Pope Paul VI said that the judge will, if inspired by the true sense of justice, "take into account all the promptings of charity and seek to avoid the rigour of the law and the rigidity of its formal expression. He will avoid the letter of the law that kills and try to imbue his interventions with the charity that is the gift of God's liberating and vivifying Spirit".³⁶ Canon Law does not make a bad person in authority good. It only helps the good and sincere ones with proper and timely indications and making them aware of their responsibilities and limitations so that they can effectively make use of their authority for the salvation of the souls entrusted to their care. This is especially true in the case of the laws on penal sanctions which give them tremendous power over individual faithful. If they choose to ignore the norms of law for any reason it will be a blow on the human face of law. Only a person with great pastoral concern will be able to deal with the law without dehumanizing it. Since canons express principles they need the proper exercise of discretion by those in authority in order to be interpreted and applied to actual situations in a way that achieves their ultimate purpose.³⁷

Conclusion

As one goes through the two Codes of Canon Law, namely CIC and

CCEO and the juridical tradition of the Church it becomes increasingly clear that the purpose of laws in the Church goes along with the purpose of the existence of the Church. Their apparent abstractness and rigidity is due to the desire of the Church to keep them to the essential principles leaving the pastoral application to the pastors and other persons entrusted with the care of souls. This pastoral character of the Codes demands that they be applied in concrete situations in accordance with the ecclesiological notions rediscovered by the Second Vatican Council. All those who are called to apply the laws need to have a pastoral outlook, that is the will and preparedness to do whatever is good for the faithful, for the correct interpretation and implementation of laws. It is the pastors who give the law a human face. This is nowhere more conspicuous than in the case of penal laws. The mind of the Church is not to impose penalties for the sake of penalizing someone but to bring him/her back to the mainstream of the community. Once the circumstances for which the penalties have been imposed cease to exist the penalty also should go. Canonical punishments are also to heal the wounds in the community as well as in the author of the delict caused by his/her act and to prevent them from doing such acts in future. The detailed procedures only help them to follow the right path. The canons give the necessary guidelines for one who is sincere and is concerned to do the right thing according to the mind of the Church. They point out also the limits. But if someone deliberately neglects the guidelines given by the canons the canons themselves become an instrument of incarceration and oppression rather than of liberation and salvation and they lose their human face and medicinal value.

Foot Notes

- 1 Paul VI, 27 January 1969, *The Pope Speaks* 14(1969-1970) 40.
2 *Ibid.* 3 *Ibid.*
4 Pope Pius XII, Address to the Clerical Students of Rome, 24 June 1939, quoted
in T. L. Bouscaren, S.J., A.C. Elli S.J. & F.N. Korth S.J., eds., *Canon Law: A
Text and Commentary*, Milwaukee 19634, iii.
5 J.A. Alesandro, "General Introduction," in J.A. Coriden, T.Green & D.E.
Heintschel, eds., *The Code of Canon Law: A Text and Commentary*, Banga-
lore 1986, 8-9.
6 It should be noted that the apparent rigidity of the Western legal system has its

basis in the desire of the legislator to give the correct guideline for ensuring maximum justice. Unfortunately the system fell into the trap of legalism owing to the bad interpretation and application of those laws.

- 7 With the mutual excommunication of the Bishop of Rome and the Patriarch of Constantinople in AD 1054 the Eastern Churches and the Western Churches parted ways and had their own development. For all practical purposes in the West the Roman Church was equated with the Catholic Church. The Catholic theological and canonistic tradition that developed later naturally reflected the Western mentality. Even though portions of all the separated Eastern Churches restored their communion with the Church of Rome by that time they had been very much reduced in their strength and prestige owing to the oppressive political regimes under which they found themselves. That caused also a stagnation in the development of their theology and canon law. So when they restored communion they had to depend on the theological and the canonistic tradition of the West for their survival on the face of the fierce opposition of those who remained outside communion. The Christians of St Thomas in India, though they never had a formal break of communion, could hardly influence any system since they had no centres of learning and had little taste for documentation.
- 8 J.A. Alesandro, *op. cit.*, p. 5.
- 9 Pope Paul VI, Allocution, 29 October 1981, AAS 73(1981) 721. Text taken from J. Hite TOR & D.J. Ward OSB, *Readings, Cases, Materials in Canon Law: A Text Book for Ministerial Students*, Revised Edition, Collegeville 1990, 158.
- 10 "Now, however, with changing conditions – for life seems to evolve more rapidly – canon law must be prudently reformed; specifically, it must be accommodated to a new way of thinking proper to the Second Ecumenical Council of the Vatican, in which pastoral care and new needs of the People of God are met". *Communicationes* 1, 41.
- 11 Pope Paul VI, Address to the Commission for Revision of the Code, 20 November 1965: AAS 57(1965) 985; 4 December 14, 1974: AAS 66(1974) 10.
- 12 On the occasion of the official presentation of CIC on 3 February 1983, Archbishop Rosalio Castilio Lara, the Pro-President of the Commission for the Revision of CIC said: "Not a few canons, especially in the matter of the sacraments or ecclesiology, offer theological syntheses of notable precision, and some, when the subject matter permits it, reproduce almost literally the very formulations of the Second Vatican Council". Cfr. *Communicationes* 15, 32.
- 13 T.J. Green, *op. cit.*, 893.
- 14 This canon is very similar to canon 102 of the Council of Trullo (A.D. 692). Cfr. H.R. Percival, *The Seven Ecumenical Councils of the Undivided Church, The Nicene and Post-Nicene Fathers*, Second Series. vol. XIV. Grand Rapids 1983, 408.
- 15 N.P. Tanner, ed., *Decrees of the Ecumenical Councils*, vol. II, London – Washington, 1990, 699.
- 16 T.J. Green, *op. cit.*, 897

- 17 Principles which govern the Revision of the Code of Canon Law. Latin text in *Communicationes* 2, 77-85; English translation by Roger Schoenbechler OSB in J. Hite & D.J. Ward, *op. cit.*, 85-86.
- 18 Quoted in J.A. Alesandro, *op. cit.*, 6. 19 *Ibid.*, 85.
- 20 J.Hite & D.J. Ward, *op. cit.*, 86. 21 *Ibid.*, 89.
- 22 *Ibid.*, 90. In spite of the best of intentions and procedures a very fundamental problem remains unanswered with regard to the laws in the Church. In the absence of a physical coercive force such as police in a state there is no way one can force an ecclesiastical authority who refuses to comply with the laws or who is unwilling to fulfil the requirements of law. For example one can get a favourable sentence from the higher instances against a diocesan bishop who refuses to fulfil the obligations of law. But if he chooses to turn a blind eye to that sentence there is no agency in the Church to force him to execute the sentence. Similarly since the judiciary in the Church is not independent of the executive the authorities can strangle it rendering it practically incapable of administering justice. Moreover, in the ordinary life of the Church there are a lot of administrative acts of the authorities which can at times be harmful to the rights of individuals or groups. There is no effective mechanism in the Church to prevent or correct such abuses. Therefore often even the most humane law may remain a dead letter. In other words, the ecclesiastical legal system is characterized by legislative and administrative supremacy. Judicial review is not a major component of the canonical system. Cfr. John A. Alesandro, *op. cit.*, 13.
- 23 It should be noted that there is in CIC a specific group of penalties called medicinal penalties. They are also called censures. Cfr. CIC, canons 1312 #1; 1331 - 1333. CCEO does not make such a distinction.
- 24 P.V. Pinto, *Commento al Codice dei Canonici delle Chiese Orientali*, Studium Romanae Rotae, Corpus Iuris Canonici II, Citta del Vaticano 2001, 1104.
- 25 Nuntia 3, 19. 26 *Ibid.*, 21. 27 Cfr. Nuntia, 3, 23-24.
- 28 One of the sources of this canon is canon 102 of the Council of Trullo. Cfr. Foot note 14 above.
- 29 Canon 497 #1 contains an *ipso iure* dismissal in the case of monks who have publicly rejected Catholic faith or who have celebrated or attempted marriage. This seems to be an instance of implicit *latae sententiae* punishment.
- 30 The system of *latae sententiae* punishments does not seem to have been in existence even in the Latin Church before 12th century. Cfr. P.V. Pinto, *op. cit.*, 1104.
- 31 Cfr. *Communicationes*, 2,, 78; Nuntia 3, 20-21.
- 32 J.A. Alesandro, *op. cit.*, 13. 33 *Ibid.*, 13 - 14. 34 *Ibid.*, 11. 35 *Ibid.*, 19
- 36 8 February , 1973, *The Pope Speaks* 20(1975-76) 81.
- 37 J.A. Alesandro, *op. cit.*, 13.

Plurality of Codes of Canon Law in the Church

Varghese Koluthara

The Church founded by Christ and spread throughout the Roman Empire and outside, was pluralistic in her nature and operation right from the beginning of her history. This pluralistic existence has been qualified by Pope John Paul II as 'the church gathered in the one spirit breathing as though with two lungs of the East and of the West and burning with the love of Christ in one heart having two ventricles'. The *corpus* of Canon Law has three units, namely, the Code of Canon Law of the Latin Church (CIC), *Pastor Bonus* (on administration of Roman Curia) and the Code of Canons of the Eastern Churches (CCEO). The author explains the pluralistic existence of the Catholic Church as a communion between the Latin and the Oriental Churches through her history and portrays the complimentary character of the three units of the *Corpus* of Canon Law as a vehicle of Charity. Dr. Varghese Koluthara CMI, Director, Institute of Oriental Canon Law, Dharamaram Vidya Kshetram, Bangalore-560 029, India.

Introduction

Today, the Catholic Church is understood as a communion of twenty-two *sui iuris* Churches, one belonging to the Latin tradition and the other twenty-one belonging to the Oriental tradition. This plurality of the existence of the one Church of Christ is to be traced from the cultural and historical factors of her pilgrimage through space and time. When Pope John Paul II on 18th October 1990 promulgated the *Code of Canons of the Eastern Churches*, through his Apostolic Constitution *Sacri Canones*, he underlined this pluralistic existence by stating that 'the church gathered in the one spirit breathes as though with two lungs of the East and of the West and that it burns with the love of Christ in one

heart having two ventricles'.¹ The plurality of churches in the Catholic Church is, thus, an accepted fact. Pope John Paul II in his apostolic constitution, *Sacri Canones*, affirms the plurality of the Codes in the Church in the following words: "*The Code of the canons of the Eastern churches (CCEO)* should be considered as a new complement to the teachings proposed by the Second Vatican Council. By the promulgation of this Code, the canonical ordering of the whole Church is, thus, at length completed, following as it does the *Code of Canon Law (CIC)* of the Latin Church, promulgated in 1983, and the "Apostolic Constitution concerning the Roman Curia" (*Pastor Bonus*) of 1988..."² The Second Vatican Council had already emphasized the plurality of Churches, almost a self-evident fact, in the following words: "The Holy Catholic Church, which is the Mystical Body of Christ, is made up of the faithful who are organically united in the Holy Spirit by the same faith, the same sacraments and the same government. They combine into different groups, which are held together by their hierarchy, and so form particular Churches or rites".³

Some scholars hold that 'this plurality is not an inherent characteristic of the Church, but an imperfection as a result of disputes and division'⁴. But from Church history we learn that multiplicity of churches has been an historical constant from the inception of her history. This Ecclesiological principle is highlighted in the documents of the Second Vatican Council. *Lumen Gentium* presents the diversity of churches not as a discordant element in the unity of the Church. The Catholic Churches of both East and West are living expressions of this diversity and entrusted with spiritual patrimonies belonging not only to themselves but to the whole Church⁵

The church was not born with its administrative organization. It evolved rules and procedures as it grew and spread throughout the world. In that process, the rules of the Church were shaped by its internal needs, the surrounding cultures and the pressures of her changed circumstances. It is the story of the pilgrim Church discovering and borrowing new ways and customs of others out of need and out of wisdom. The present codes of canon law are a result of this evolution of her pilgrimage through times and cultures.

History of the Formation of Law in the Church

To understand the human face of the Church law we need to learn its historical evolution from the post-apostolic times to the present day. It

is a very complex reality as life itself is. We refer to some relevant historical events from first century till today, which led to the historical necessity of the plurality of the Codes of Canon Law in the Church. Therefore, we do not follow all the historical trends, which decided her history. This long history of canon law can be summarized in to the following periods⁶:

- 1) The Post-apostolic and Early Church (from 1st - 4th centuries)
- 2) The Church of the Empire (from 4th - 8th centuries)
- 3) The Church and Feudalism (from 8th - 12th centuries)
- 4) The Church and the legal formulations (from 12th - 20th centuries)
- 5) The Codification of Canon Law (from 20th until today)

The Post-Apostolic and early Church (from 1st - 4th centuries)

After the New Testament period, local churches were scattered all around the Mediterranean basin. There was mutual recognition and some communication among them. But there was no central authority to coordinate them. As Christianity spread throughout the Roman Empire from its birth place in Syria, it also spread into the Persian empire, to Ethiopia and as far as India. Significantly, the population of Syria included those who spoke Syriac and Greek, the common language of the Roman East, and it was the main vehicle for the transmission of Christianity; by the 4th century, as the new religion moved eastwards, Syriac and its dialect Aramaic was for a long period the language of administration in the Persian empire.⁷ The *Didache* formed the pattern for the small collections of rules about the life of the church in the first two hundred years after the New Testament times. The most significant development of this early period for canon law is the synodal or conciliar process in the church. It was patterned after the council of Jerusalem, as depicted in Acts 15. Local councils were held in Asia Minor, North Africa, Spain, Italy and France. In the 4th century this conciliar process expanded to what we now call ecumenical councils. The first of these 'universal' councils, called by the Roman Emperor Constantine, was in the Eastern part of the Ancient Roman Empire. The canons of Nicea (325) dealt with a range of topics: for example, clerical chastity, ordination of bishops, clerical non transferability, distribution of holy communion, and the appropriate postures for prayer.⁸

In this early period the church was relatively free to develop its own regulative structures. It was a minority religious group established in the urban centres of the Roman Empire. Before Constantine, the church was either ignored or persecuted by the government. It retained the customs and practices derived from Jewish tradition, for example, the conciliar process and offices like '*Episkopos*' and '*presbyteros*' from the Greek context. However, the church's world was organized by the law of the Roman Empire, and naturally, when the church needed new structures, it often borrowed them from the Roman Legal structures. For example, parish, diocese and province were terms directly taken over from the subdivisions of the Roman Empire.⁹

The Church of the Empire (from 4th - 8th centuries)

The gospel was preached in the Roman Empire which provided the world with political, economical and cultural unity. Diocletian (A. D. 285), in order to govern the vast Roman empire, divided it into east and west. By the time of Constantine (312) Christianity became a favoured religion. He built a new Rome in Byzantium in the Eastern part of the Ancient Roman Empire. And he recognized the Church and granted it not only freedom but a position of preference and privilege. The foundation of Constantinople, the new Rome, on the site of the former Byzantium gave the empire a new centre on the acropolis, where both the Christian emperor and the Bishop of his capital had their residences. Constantinople became the seat of imperial Christianity and its status was recognized in their council held there in 381, which gave its Bishop precedence immediately after the Bishop of Old Rome.¹⁰ The geographical division made in the Ancient Roman Empire also became the division between the churches developed in the eastern and western parts of the Roman Empire. During the late years of 4th century Bishop Ambrose of Milan and Emperor Theodosius I worked out a relatively balanced alliance. The church respected and supported imperial authority and policies, and the state honoured the church authority in matters of faith, discipline of the clergy, liturgy and the administration of church property. The Church had become the church of the empire.¹¹

In the new status the Church could not help being strongly influenced by Roman law. It borrowed freely from the well-developed legal structures and procedures of the empire. In fact, the church was compelled to adopt elements of Roman Law because the Christian

emperors, especially the Greek Legal compilers of the fifth and sixth centuries, Theodosius II (*Codex Theodosianus* of 438) and Justinian I (*Corpus Iuris* 529) legislated for the church.¹²

Christianity rapidly became the state religion with all its privileges and hazards associated with closeness to the centre of power. In effect, the churches sacralized the Roman Empire¹³. There was a big numerical growth. It spread out from cities to villages. Bishops deputed presbyters to lead the Christian communities. But gradually the bishops lost all personal relationships with the members of the local churches.¹⁴

The gradual evolution of the Bishop of Rome into a figure of central authority is another key factor in the development of canon law. In the West, Bishops referred questions to Rome. Because of its connections with the Apostles Peter and Paul and because of its importance as the imperial capital, Bishop of Rome grew in stature and influence during the 4th century.¹⁵

Thus we find five patriarchs in the Roman Empire by the end of 4th century. They were (i) Patriarch of Rome (ii) Patriarch of Constantinople (iii) Patriarch of Alexandria (iv) Patriarch of Antioch and (v) Patriarch of Jerusalem. But the Patriarch of Rome was emerging as '*primus inter pares*'. There was 'unity in diversity' until schisms developed in different Patriarchates. By the time of Leo I (440-461) the Bishop of Rome was recognized as the Patriarch of the West with an undisputed primacy. This unique leadership role was not yet acknowledged in the East. Leo developed the theory that Bishop of Rome is the heir of Peter. The bishop of Rome called himself as pope (*Papa* (Greek) means Father) and began to issue preceptive letters of *decretales* (decrees) during the 5th century. These letters began to be collected and placed along side the earlier customary and conciliar regulation for the life of the church. During this period, the influence of Roman Law contributed greatly in the centralization of the church and monarchical role of the Pope within the church.¹⁶

By the early 6th century, Latin and Greek had become languages of diverging cultures. In the West, invasions of the Arian Goths caused political turmoil, while in the East the Church was embroiled in theological controversies. Although Rome and Constantinople were normally united in defense of the same doctrine' through the 5th and 6th centuries, their actions to preserve what they saw as orthodoxy

contributed the establishment of separate churches in Egypt, Syria and Armenia. The widespread missionary work of the church of the east spread Syrian Christianity throughout central Asia and as far as China by the mid-seventh century. The rise of Islam from 7th century radically changed the political and religious character of the Eastern Mediterranean.¹⁷

The Church and Feudalism (from 8th -12th centuries)

Politically, the hallmark of this period was Feudalism, system based on the concepts of vassalage, fidelity, and benefice. These and other features of feudal law influenced the life of the church also. Feudalism developed from the weakness of Roman and other European governments and the need for protection against enemies of the middle ages.¹⁸

A restored Papacy faced determined German kings in a struggle to regain control of ecclesiastical offices. In 1074 during a synod held in Rome Pope Gregory VIII enforced clerical celibacy as obligatory. Mass stipends, Oaths of fidelity and the gesture of placing one's folded hands within those of ordaining bishops are from the feudal system of this period.¹⁹

In the eastern part of the Roman Empire canonical collections came out during this period under the name '*Nomokanon*' (Greek) meaning Laws. They were compilations of civil law and church law. It is a collection of secular and ecclesiastical laws, which arose by the initiative of civil authorities. The civil authorities assumed the position of the guardians of the church and disposed of matters which were of ecclesiastical nature. In the Western Church, important canonical collections like '*Tripartita*', '*Decretum Panormia*' and '*Pseudo-Isidorian decretals*' also were published during this period.²⁰

Drifting of the East from the West

In 1043 Michael Cerularius (1043-1058), the patriarch of Constantinople, directed the Latin Churches in Constantinople to close down, while they were using unleavened bread for the Mass.²¹ He also tried to impose Byzantine ritual, such as the use of leavened bread in communion on the Armenian Church. Early in 1054 Pope Leo IX sent a delegate to Byzantium. In his letter the Pope also made a request to obey him but this Papal call to obedience met with a cool reception from patriarch Michel Cerularius. The presence of the Pope's delegates

in Constantinople evoked various expressions of hostility from Byzantine churchmen to Western practices. The Easterners also did not appreciate the Latin use of unleavened bread. On the other hand, Latins could not understand the system of married clerics which prevailed in Byzantium. The summer of 1054 at Constantinople presents a bizarre, even comic, spectacle. That is the beginning of a sort of pamphlet warfare.²²

On July 16, 1054, the delegate from Rome placed a Bull of excommunication on the main altar of St. Sophia. Historians call this incident as a “time-bomb” which shattered the communion between the majority of Eastern Churches with the Church of Rome. The Papal delegates left the city soon afterwards, after giving the “kiss of peace” to Constantine IX who received them in his palace. A synod was held on 20th July 1054. Constantine IX’s decree was read out ordering that the delegates bull be burned, and those responsible for the bull were anathematized. Four days later the anathema was repeated and a copy of the offending bull was burned in public. These mutual excommunications gave a new and sharper definition to the estrangement, which was already discernible before 1054.²³ It is called the great schism. It resulted in the rupture of communion between the majority of the Eastern Churches and the Church of Rome²⁴.

The East is East and the West is West

This phenomenon occurred due to several factors. It can be summarized in the following words: The official language of the Church of Rome was Latin while that of Constantinople was Greek. The Greeks considered themselves superior in culture, compared to Romans. Therefore there is a saying that even though Rome conquered militarily, Greeks conquered Romans culturally. The Greeks and the East considered the Westerners almost barbarians because they spoke no Greek language or knew no philosophy. Even in the thinking of the churches of the East and the West, this antagonistic feeling prevailed very strongly. Leavened bread was used in the Eucharistic service in the East, while unleavened bread was used in the West. In Byzantium the existence of married priests was permitted and was customary, as is still in the Orthodox Church today²⁵. Celibacy was strictly enforced for priests in the West. Even in the field of theology the Latin and Greek fathers did not agree in explaining Christology and other doctrines of the church. The New Testament was written in Greek and it was unintelligible to

any educated Byzantine. Churches in the East, such as, Thessalonica, Corinth, Ephesus, Philippi, and Colossus received most of Paul's letters²⁶.

In the East and West Christianity took root in the cities first and then in the countryside. In general, Churches of the East were prepared to recognize that some special dignity belonged to the Bishop of Rome as being the occupant of the old imperial capital, but the ecumenical synods were presided over by the emperor as the supreme body of the church and the representatives of all Churches. During the first five centuries, several councils were convened. They resulted in a considerable number of decisions. They were all the more important because the eastern part of the Roman Empire dominated the declining west both ecclesiastically and politically. Up to the fifteenth century Roman law, with the entire *Corpus Iuris Civilis* of Justinian, as its sources, endured and continued to be applicable under the name of Byzantine or late - Roman law.²⁷

From the very beginning there arose also various Christological theories, some of which were condemned as heretical by the ecumenical Councils. The leaders of these heretical groups were none other than bishops and patriarchs themselves. In spite of the condemnation by the councils they set up their own hierarchies and had large following. The entire Church of Celeucia-Stesiphon (Persian Empire) sided with Nestorian party by A.D 486 in the synod of catholicos Acacius I.. In this case there was no duplication of hierarchy as the entire Church became Nestorian. About the communion of the Indian Church of St. Thomas Christians we do not have any precise information. In any case she did not have much direct contact with the Church of Rome for a very long time but at the same maintained the communication with the East Syrian Church.

The Church and the Legal Formulations (from 12th - 20th centuries)

The Eastern Churches in the ancient Roman Empire were on a low ebb during this period. Doctrinal disputes, political and cultural difference among the believers also contributed towards it. Two heresies during the 5th century in the Eastern churches resulted in the separation of several hierarchies and communities from communion with the rest of the Christian churches.

Many of the characteristics that today distinguish Eastern Christianity developed very early in Christian history. As early as the fifth century,

the legacy of unresolved differences separating East and West began gradually to mount up. By the end of the twelfth century, the Eastern and Western parts of the church had come to the point of thinking of each other as separated bodies. Unfortunately, but predictably, each side held the other responsible for having abandoned the true Christian tradition.²⁸

The Western Church's inclusion, and the Eastern Church's alleged exclusion, of a phrase in the Nicene Creed was the basis of charge and counter-charge on more than one occasion. The controversial insertion, the Latin word *filioque* meaning 'and the Son', which remains today also as one of the significant points of disagreement, between the agents of the Roman Pope, Leo IX (1049-1054), and the patriarch of Constantinople, Michael Cerularius (1043-58), proved to be the final one. Repeated initiatives to heal the schism and reunite the Roman Catholic and Eastern Orthodox parts of the church have so far failed.²⁹

The first crusade at the end of the 11th century resulted in an occupation of Jerusalem by Christians. They brought with them Western European and Latin customs to the East. Since Eastern Churches lost contact with Rome after 1054, the crusaders established Latin Patriarchates in the places previously held by the Easterners. By the end of the 13th century the Moslems had retaken the entire eastern territory from the Christians³⁰.

The final conquest of Constantinople in 1453 by the Turks put an end to the Eastern Roman empire, the most lasting Empire in the history of the Western World³¹. On the eve of the conquest of Constantinople, the council of Florence (1431-45) tried to establish a union of the Eastern churches and the Western church. However, there was no permanent solution because the Western church primarily wanted to extend its authority over the Eastern Churches. But the Eastern churches looked up to Western church only for military assistance against the Turks. The discussions and clarifications between the Western and Eastern Churches scored the theoretical basis for the reunion of portions of various eastern non-Catholic Churches with Rome. In the East, the Arabs-Moslem conquest, the Christians of the East had to accept a status of second class citizens; their numbers diminished and their economic status declined. The era of great basilicas and monasteries had come to an end during this period³².

During the 13th century the study of Canon Law flourished again in Episcopal Schools. Because of the intimate bond between Law and moral theology moralists began to codify rules of law. The theological writings of Peter Lombard and Thomas Aquinas are proofs for it. Moreover, the medieval canonists began to supplement canon law with rules from Roman law, which they adapted in a Christian manner. Many Jurists of that time were trained in both canon and civil laws. During 14th century the Italian universities of Bologna, Pavia, Padua, Pisa, and Perugia were centres of scientific study of law. In the beginning of 16th century the general situation of the Catholic Church had reached such a low point that a total reform proved to be inevitable. The council of Trent (1545-1563) did not confine itself to doctrinal decrees alone but promulgated disciplinary rules also. The council of Trent was above all a council in which the note of the bishops was emphasised. It persuasively confirmed the authority of the individual Bishop as a delegate of the Pope³³.

Till the end of 17th century, the science of Law was practiced according to ancient exegetical and arbitrary methods. The first half of the 19th century (1800 - 1860) was characterized primarily by the waning influence and even decline of canon law. Canon law presented itself as a closed system. The ecclesiastical legislator was not sufficiently flexible to adapt the rigid rules to the changed circumstances of time and place. Thus in the mission countries when the Bishops themselves legislated and arbitrarily disregarded the *ius canonicum universale* and the study of canon law became practically impossible. Canon law was treated in the centres of moral theology. In order to correct this situation faculties of canon law were established in the papal atheneum of the Lateran, Rome, in 1853, Gregorian University in 1876 and Anselmum in 1888, Angelicum in 1896 and in the Catholic University of Washington in 1898³⁴.

It gradually became clear that canon law urgently needed to be revised. Pope Pius IX on 6th December 1864 regulated the cardinals for their opinion for convening a general council. On 2nd January 1898 Pietro Gasparri (1852 - 1934) was appointed as the secretary of the commission of the cardinals for the Codification of the canon law of the Latin Church³⁵. In the period immediately preceding the I Vatican Council, in almost all the Churches of the East there prevailed a vast juridical uncertainty as well as confusion and caprice: if the tree "forgets" its

own roots, it cannot blossom.³⁶ Patriarch Iusef, in a letter dated May 12th, 1866, admitted that “the Oriental Church stands in need of reform in many areas” and he listed a number of these. He stressed “the lack of a proper canon Law in Harmony with the usages of each Rite” and he asserted that “the Ancient canons are impracticable and as a result the Eastern Churches in many things are subject to arbitrary government”³⁷

The Codification of Canon Law (20TH c. until Today)

For decades the bishops and canonists had sought for a new collection of canons. In March 1904, Pope Pius X set in motion the difficult task of collecting the laws of the universal Church in clear and concise manner, adapting them to the requirements of time. To direct the efforts he chose a canonist named Pietro Gasparri. He worked with commissions of consultors for 10 years at the task of organizing, sifting and reformulating the canons. It was more a work of legal drafting and codifying³⁸ than legislating.

The codification of canons was completed in 1914. It was promulgated by Pope Benedict XV on 27 May 1917 and it came into force on 19th May 1918. The new code was hailed as a great success. It was handy, well ordered, having 2414 canons. The code helped in the centralization of authority at both Papal and Episcopal levels; and it reinforced extreme uniformity of practice in the church. But it also brought relative order out of the chaotic State of Canon Law at the beginning of the 20th century.³⁹ It superseded all other previous collections. For the first time in the history of Catholic Church it had its official, exclusive and universal collection of laws for the Latin Church.⁴⁰

The Eastern Churches - during the periods of full communion with the See of Rome and during the periods when communion was ruptured - were also active in their legislative activity and each Church had amassed an extensive body of laws. During the preliminary phase of Vatican Council I (1869 - 70), the written opinions submitted by Eastern Catholic Patriarchs and bishops expressed the urgent need for a body of laws which would govern all the Eastern Catholic Churches. On July 17, 1935 Pope Pius XI established the *Pontifical commission for the redaction of Eastern Canon Law*⁴¹. During the first millenium The *Sacri Canones* constituted the common patrimony of all the Eastern Churches. Later almost all the Churches neglected this patrimony and did their best each to have its own proper Code based on by and large on the ‘*Ius*

Decretalium’ of the Latin Church. Ivan Zuzek comments on this state of the Oriental Churches as follows: “when the varietas of the East forgets the *Sacri Canones* and tends to be based upon the *Ius Decretalium* of the Latin Church, then it has no longer any reason to exist: one has reached de facto the *Unicitas disciplinae*...just before the Oriental Canonical Codification initiated by Pius XI in 1927, the experience of the Eastern Catholic Churches with regard to the *Sacri Canones* was like what I would dare to call a slow but progressive separation from their own roots; and this in the long run leads to an inexorable decline and loss of identity, to the point of stifling the very ‘*raison d’etre*’ of one who commits such a crime against himself.”⁴² After more than 12 years of work, in March, 1948 the commission presented to Pope Pius XII a complete draft of the *Codex Iuris Canonici Orientalis* in a rather final form.⁴³

Because there was an immediate need by some churches for certain parts of the new legislation, some portions of the Canons were promulgated.⁴⁴ They were the four *Motu proprio* given at the initiative of the Roman Pontiff: *Crebrae Allatae* (Law on marriage, given on 22nd February 1949), *Sollicitudinem Nostram* (Law on Procedure, given on 6th January 1950), *Postquam Apostolicis Litteris* (Law on Religious, given on 9th February 1952), and *Cleri Sanctitati* (Law on Clerics and oriental rites, given on 2nd June 1957). The Canons on sacraments were also codified but the project of revision was abruptly stopped. On 25th January 1959, Pope John XXIII announced the convocation of a synod for the diocese of Rome and later on an ecumenical council for the universal church.⁴⁵

Need of a Separate Code for the East

The controversy about the need of a single code or two codes in the Catholic Church was an issue in the Church. A single code would link the Eastern and Western Churches more closely. The Eastern divergence would be mentioned in it and this might even emphasize them more strongly. Thus all Catholics could have the same code. The Eastern Catholics would become familiar with the Latin discipline, and the Western Catholics could no longer remain ignorant of that of the East⁴⁶. However, when all things are considered, these advantages of a single Code are outweighed by the practical inconveniences and some very important ecumenical considerations: (i)” in the first place, it is basically

unjust always to present the Eastern divergences as exceptions to the common rule. The Latin Church, however large, is no less a particular church than the smallest of the eastern Churches. The Latin Roman Church and the Catholic Church are not identical"⁴⁷. Therefore a single Code is not a correct approach to be approved. (ii) The "Latinizing tendency is so widespread that the best Canonists of the Eastern Churches at the present time are only conversant with Latin -Eastern Law- which is to say a law fundamentally Latin but dotted with Eastern terminology here and there"⁴⁸. (iii) A single codification is a "built -in tendency to sacrifice as much as possible of the differences in Eastern law and thus Latinize it even more. Rome's attempts to codify Eastern law showed how dangerous it is simply to take Latin law as the basis, and it would clearly be even more dangerous to try and fuse the eastern and the Latin in a single code"⁴⁹. (iv) It is generally admitted that "if the Orthodox Churches are one day to reestablish communion with Rome, it will be by way of the eastern Churches, already reunited or by the canonical status granted them within the Catholic Churches. This cannot be achieved by a single Code for the Roman Church and the Eastern Catholic Churches"⁵⁰. In the sessions of the I Vatican Council the Latin Patriarch of Jerusalem proposed among other things, "disciplinary unity" as "extremely desirable and of the highest importance for the strength and growth of the Church" and for this reason that "it deserves to be actively supported with every effort", as well as "to raise" the oriental Church to "the same level" as the Latin Church, "so as to allow it to share in the advantages of order and great perfection that are to be found in its discipline".⁵¹ In the same First Vatican Council, "against the stand taken by some for a single code for the whole Church, the Chaldean Patriarch, Joseph Audo, spoke vigorously in the council hall for legitimate disciplinary pluralism".⁵² The Secretary of the Preparatory Commission of the Codification of Oriental Canon Law, in one of its meetings on September 3^d, 1869, Serafino Cretoni, in order to define the matter precisely, formulated the following three points,: "the future Council should decide upon either only one set of disciplinary Norms that would be common to East and West, or one set of Norms for the West and another for all the Oriental Churches, or, finally, one set of norms for the West and as many for the East as there are Churches there which differ among themselves with regard to the Rite"⁵³ Finally, respecting the demands for a constitutional Code, attempts were made.

Thus, a Code, which would be common to Eastern and Latin Churches, was formulated under the name the Fundamental Law of the Church (*Lex Ecclesiae Fundamentalis*).

Attempt for a Fundamental Law of the Church (*Lex Ecclesiae Fundamentalis*)

During the discussion about the reform of the Code of Canon Law the idea emerged of a constitution for the Church which would be common and basic to the whole church, both Latin and Eastern.⁵⁴ Pope Paul VI himself also mentioned to the Commission this possibility for the Revision of Canon Law on November 20, 1965.⁵⁵ Parallel to the work of the revision of the Code of Canon Law, was the work of an independent commission charged with the task of formulating a *Lex Ecclesiae Fundamentalis* (*LEF*) or Fundamental Law of the Church. This was intended to be a statement of what could be regarded as the constitutional law of the church, containing the basic principles and rules governing all its laws. It may sound like a constitution as we find in civil societies. But the Church cannot be fully considered as a democratic society. If, then a constitution is to be formally valid for the whole Church, it must at least leave room for differences and therefore rest satisfied with the essentials that both churches have in common.⁵⁶ The numerous drafts produced reflected the varied reactions and debate raised in the process. There was a fear that such a fundamental statement might impede the legitimate evolution of thought in the area of ecclesiology. Difficulties were also seen in the relationship between the law of the Code, particular local legislation and this constitutional law.⁵⁷

The work did, however, proceed, and in 1981 a final draft was submitted to Pope Paul VI for his approval. His approval was not granted. No reasons are given for not promulgating *LEF*. Many of the canons of *LEF* were transferred into *CIC* 1983 (cc. 208-223) and *CCEO* 1990 (cc. 11-26). The following is the summary of the 1981 draft. It has got two titles (the Church and the Functions of the Church). Again title-I, the Church, is divided into three chapters (i. all Christian faithful, ii. hierarchical structure of the Church and iii. mission of the Church). Title-II, Functions of the church, three chapters (i. Teaching function of the Church, ii. Sanctifying function of the Church and iii. Ruling function of the Church). It is not a promulgated code. It was a dream of Pope Paul VI. He dreamed of a Church having a fundamental constitution.

He had in mind a “Fundamental Law”. It should consist of the basic structures of the Church. It should form the basis for the codes of discipline for the Latin and the Oriental Churches.

LEF had serious shortcomings, such as it drew heavily from second Vatican document and it failed to convey the basic vision of the Catholic Church as a communion of different Churches. The fundamental law of the Church (*LEF*) was preoccupied with expressions on hierarchy. Thus it received mixed reactions. It may be because of the uncompromising attitude of the leaders and the scholars of the Church regarding the serious shortcomings of this constitution, and so it never became a Law. But it should be said that it is the first and best attempt made in the Church to have a constitutional statement on the Church as a whole.

Vatican II and Post Conciliar Codes of Canon Law

Pope Paul VI pointed out two things to be observed in the work of revising the Code of canon law: “...Canon Law must be accommodated to the manner of thinking in accord with Vatican Second, which stresses very much the pastoral ministry; canon Law must, therefore, consider the new needs of the people of God.”⁵⁸ Hence a series of important principles for the revised Code was derived from the conciliar teachings, such as, pastoral tone and purpose, charity as well as justice; fundamental equality of believers in their rights (and responsibilities); power and authority seen as service; the major principle of subsidiarity, whether in view of the local churches, in which the *ecclesia* is present or in their corporate groups, especially the national conferences of bishops acting on behalf of groups of particular or local churches⁵⁹. Then a series of necessary but secondary considerations was listed in those principles of 1967: the retention of code’s juridic character but with better protection of rights; better coordination of internal and external forums; the (exceptional) non-territorial personal jurisdictions; fewer and simpler penalties and fewer reservations of canonical faculties and development of administrative or executive procedures and powers⁶⁰.

Basing on the new Theological and Ecclesiological vision on the church of the II Vatican Council, the revision of Code of canon law of the Latin Church (CIC 1917) and the completion and revision of the four *Motu Proprio* of the oriental churches had to be done. Because they were outdated and new pastoral challenges of the church had to be answered.

New Code of the Canon Law of the Latin Church

First of all, we discuss the revision process of Code of Canon Law of the Latin Church. Stressing on the need for the pastoral dimension of the new code Pope Paul VI set the commission for the work on October 20, 1965. He told the commission that the new code should reflect the new way of thinking of the church (*novus habitus mentis*) and the old canonical styles of formalism, legalistic, hair-splitting and secular juridicism had to be transcended.⁶¹ They were given ten principles⁶² for the revision of the CIC of the Latin Church. The Pontifical Commission for the revision and codification of the Latin Church was presided by Cardinal Felici. The process of revision and review took many years and the work of the pontifical commission can be found from *Communicationes*, the official journal of the commission. When the codification work was completed, on 25th January 1983 Pope John Paul II through his Apostolic Constitution *Sacrae Disciplinae Leges* promulgated the Code of Canon Law of the Latin Church and it came into force on 27 November 1983. It has legal binding only for the Latin Church. In promulgating the Code in the Apostolic Constitution *Sacrae Disciplinae Leges*, Pope John Paul II added a new stress on key elements of the projects: the concept of church as people of God and as *communio*; collegiality and primacy; participation of all in the threefold office of Christ with a definition of the rights of all Christians, especially the non-ordained; and commitment to ecumenism- although, in fact, this last element was barely touched in the code itself⁶³.

Arrangement of the material of the revised code of canon law must be understood according to the mind and spirit of the decrees of Vatican II and according to the scientific requirements of canonical legislation. The 1917 code describes the constitutional structures of the church in terms of the legal determination of the rights and duties of certain office. It was divided into 5 books (*general norms, of persons, of things, of process, of crimes and punishments*) after the model of the Roman law's division into persons, things and actions. The new code (1983) conceives the church as people of God and the code is divided into 7 books (*general norms, people of God, teaching office of the church, the sanctifying office of the church, temporal goods of the church, sanctions in the church, processes*) based on the three functions of the church - teaching, governing and sanctifying - adopted in the documents of the Vatican Council⁶⁴.

Almost two decades after the promulgation of the Code of Canon Law of the Latin Church it has reached a juncture where it calls for reform and reformulation. Pragmatically speaking, "this openness to change can be viewed in the canonical developments, good and bad, strong and weak in the period since 1983."⁶⁵

Pastor Bonus (1988)

Reform of the Roman Curia has been a perennial concern in the Church. During the 12th century the curia received its first major structural reform after nearly a millennium of functioning in the manner typical of a Patriarchal See. Pius X reorganized the Roman Congregations in 1908. With a few modification this reform was incorporated in the 1917 Code of Canon Law (cc. 242-264). Both Pius XI and Pius XII are said to have considered further reforms. But it was as a result of the efforts of John XXIII, the bishops at the Second Vatican Council and Paul VI that the major steps of reform were again taken in 1967. Paul VI constituted a study commission in 1974, which had practically completed its work when he died in 1978. John Paul II named his own commission to do a complete review of this work. The commission compiled a draft in 1985⁶⁶. But the draft was not accepted and a new commission was constituted which eventually produced *Pastor bonus*⁶⁷, the apostolic Constitution on the Roman Curia. It was promulgated by pope John Paul II on 28th June, 1988 and it came into force on 1st March, 1989.

In presenting *Pastor bonus*⁶⁸, Pope John Paul II emphasized the five principles and the intentions, which he says, inspired this new document: (i) to bring the image of the curia more in line with the time: (ii) to bring the curia in line with the renewal of the law (new codes of canon law for the Latin and Eastern Churches); (iii) to recognize the competence of the traditional dicasteries in a more logical and clear manner; (iv) to make the post-conciliar dicasteries more effective in service to the pastoral work of the Church; (v) to take new initiatives to promote collaboration among the dicasteries.⁶⁹

The Apostolic Constitution consists of two major portions. The first is an introductory section in which Pope John Paul II sets out the doctrinal principles, which form the basis for the Curia's existence. Here he underlines the role of the good shepherd (cf. Jn 10: 11-14) conferred on the bishops and the successor of Peter, to be at the service or *diaconia* for more and more communion in the whole body of the Church. All

pastors of the Church, who are Christ's servants, must seek above all the work of salvation in the world. To this end, the Roman Curia has strong desire in each and every sphere of its important work⁷⁰. In the second part the actual norms of the Roman Curia are set forth⁷¹. There are 193 Articles. They are divided into nine captions: (i) general norms, (ii) the secretary of State, (iii) the congregations, (iv) tribunals, (v) pontifical councils, (vi) offices, (vii) other institutes of Roman curia (viii) advocates and (ix) institutions connected with the Holy See. The document also contains two appendices: (i) "*Ad limina*" visits of bishops and (ii) the question of workers for the Apostolic See⁷². The principle of communion and the pastoral accent in which the Curial reforms were envisaged by Pope John Paul II through his Apostolic Constitution (*Pastor bonus*), are to be realized in the functioning of the Roman Curia. On an initial reading, *Pastor Bonus* "does not seem to be a significant advance on the previous legislation (*Regimini*), nor as an especially evident response to the expectations of Curial reform that have been building since the start of the Second Vatican Council."⁷³ The Apostolic Constitution should set new modes and styles for achieving interrelationship among the different dicasteries in promoting communion among the Churches of the East and West and for bringing in harmony between the primatial authority of the Roman Pontiff and the College of the Bishops.

Code of Canons of the Eastern Churches (1990)

During Vatican Council I (1869-1870) the need for a common code for Eastern Churches, adapted to the needs of the times, was discussed, but no concrete action was taken. Only after the benefits of the 1917 Latin Code were appreciated was a serious effort made to formulate a similar Code for the Eastern Churches. Thus four *motu proprio* were promulgated for the Oriental Churches. The unpromulgated text remained in the archives of the pre-conciliar commission. On June 10, 1972, Pope Paul VI established the Pontifical commission for the Revision of the Code of Eastern Canon Law, headed by Joseph Cardinal Parecattil of the Syro-Malabar Church. It was subsequently divided into ten sub-commissions⁷⁴. The first plenary meeting of the PCCICOR (Pontifical commission for the Revision of Eastern Canon Law) took place on March 18-23, 1974. During that meeting Pope Paul VI gave an allocation that was to provide direction for the codification of the project.

A set of guidelines was also approved which articulated the fundamental principles that would be operative in the revision process. The ten guidelines were the following: (i) to have a single Code, (ii) inspiration from genuine Eastern sources, (iii) ecumenical character, (iv) juridical nature, (v) pastoral character, (vi) principle of subsidiarity, (vii) notion of rites and particular Churches, (viii) fundamental equality of all the baptized (ix) the same procedural norms for all Catholics, (x) all automatic penalties to be eliminated with canonical admonitions⁷⁵. These guidelines indicate the fundamental principles, which were to be operative throughout the revision process. They were published in *Nuntia*, the official journal of the PCCICOR.⁷⁶ The two preparatory commissions, according to I. Zuzek, (which functioned from 1929-1935 and the commission for drawing up of the CICO, from 1935-1972) that all the *sacri canones* were considered primary “fontes” for the Oriental Canon Law.⁷⁷

The *Codex Canonum Ecclesiarum Orientalium* (CCEO) was promulgated by Pope John Paul II with the Apostolic Consitution *Sacri Canones* on October 18, 1990 and it came into force on October 1st 1991. While practical considerations made it impossible for a “co-promulgation” of the code by the Roman Pontiff and the heads of the Eastern Catholic Churches⁷⁸, the manner of its promulgation posed certain ecumenical difficulties, since Eastern tradition requires that such a body of law be promulgated by a synod⁷⁹. CCEO has 1546 canons divided under 30 titles. On the other hand, CIC has 1752 Canons given in 7 books. The reduction of number of canons in CCEO is due to various factors: (i) While CIC contains common law as well as particular laws of the Latin Church, CCEO contains only common laws applicable for the 21 Eastern Catholic Churches and many matters are relegated to the particular law of the various churches *sui iuris*. (ii) There are certain institutions (e.g., the synod of Bishops, Roman Curia, Roman Rota, Apostolic Signatura, Cardinals and Papal legates) which, though serving the universal Church, are strictly speaking Latin institutions. Hence, the canons in CIC 342 to 367 are briefly referred to in the Eastern code (CCEO cc 46,48, 1056). (iii) Finally, the drafters of the Eastern codes could take advantage of the critiques made of the Latin Code and provide a text with grater conciseness⁸⁰. The *Codex Canonum Ecclesiarum Orientalium* has been drawn up according to the “mens” of the Second Vatican Council : the *sacri canones* are the foundation of the entire

Code, and it is in the light of these that the Code should be understood and interpreted.⁸¹

The Eastern Code is occasionally more detailed than the CIC. The canonical institution of tradition, rite and church *sui iuris* are treated only indirectly in CIC cc 111-112, while CCEO treats in a detailed manner, the enrollment in church *sui iuris* and the preservation of the rites (CCEO cc 27-41), the Ecclesial groupings of Patriarchal, Major Archiepiscopal, Metropolitan and other churches are extensively treated in the CCEO (cc 55-176), while CIC c 438 describes patriarchal office as a prerogative of honour only exceptionally endowed with the power of government.⁸² It is said that by the promulgation of the CCEO a new spring season is inaugurated in the ecclesial life of the oriental catholic churches. This 'vehicle of charity' has atlast entered into the ecclesial sphere of the universal Church.

Conclusion

Almost two decades have passed since the promulgation of the Code of Canon Law of the Latin Church and more than a decade has passed since the promulgation of the Code of Canons of the Eastern Churches both of which meant for giving order and discipline tor the faith life of the Catholic Church. To interpret and understand the spirit of these two Codes of the one Church of Christ, we need to know and appreciate the pluralistic sources and theological methodologies of the Latin Church and the Oriental churches. The Latin Church, which got nurtured in the Roman culture was very much influenced by the order and discipline of the Roman Empire. Thus, the Western Ecclesiology and its theological methodology were expressing its faith life as a 'Faith seeking understanding' of the revealing God. This 'faith seeking understanding of God' was expressed in giving order and discipline to the Church with the perfection of the Roman law. Thus, the Latin Canon Law excels in order, structures, jurisdiction, stability, clarity, precision and legal perfection. On the other hand, *Code of Canons of the Eastern Churches* tries to depict the faith life of the Oriental Churches as a communion experience discovering and discerning the work of the Holy Spirit within the community. It could be said that Oriental Churches, in general, have a theological approach and a methodology, which can be summed up as *Lex orandi. Lex credendi* (law of prayer is the law of faith) while the Latin Canon Law emphasized the rational discourse, of the Western

Church. The Oriental Churches express their faith through contemplation, intuitive knowledge and liturgical experience in the community. This experiential knowledge in the community of the Oriental Churches also speaks about their legal articulation, which evolved out of their customs, usages and healthy traditions. Due to many factors, the Eastern Churches could not claim a legal tradition right from the first century till today without interruption and this is different from what we find in the Western Church. This flexibility, diversity, synodal practice, accent on monasticism, married clerical system, medicinal approach to punishment and importance of the provisions for the Particular Laws of each Eastern *sui iuris* Church, make the CCEO different from CIC. CIC and CCEO as 'vehicles of charity' enter the ecclesial life in promoting communion of Churches in the catholicity of the Church of Christ.

The pluralistic perspectives on the laws of the Church and the purpose of the Codes of the Canon Law in the Church are reflected in the two promulgative letters used by John Paul II, the same legislator for the Latin Church and the Oriental Churches; the Apostolic Constitutions, *Sacrae Disciplinae Leges* for CIC expressing order and discipline and *Sacri Canones*⁸³ for CCEO, expressing a discipline strengthened by the communal experience. Therefore both these codes are breathing together unity and diversity in the Church of Christ. Thus, Pope John Paul II instructed the Catholic Church that the two Codes of Canon Law are complementing each other and a comparative study should form the style of learning and research in the fields of canon law in the church to find out the beauty of the *corpus* of canon Law as a 'vehicle of charity'. The *corpus* of Canon Law has 'to be an instrument in the service of the economy of salvation of souls' and it should become 'the supreme end of all the Laws of the Church'⁸⁴ that will pave the way for 'tranquillity of order' in the Church of Christ.

Foot Notes

- 1 Pope John Paul II, "Sacred Canons", *Code of Canons of the Eastern Churches*, Washington 2001, xxiii-xxiv.
- 2 Pope John Paul II, "Sacred Canons", xxv.
- 3 OE., 2.
- 4 John D. Faris, *Eastern Catholic Churches: Constitution and Governance*, New York 1992, 1.

- 5 *LG*, 13.
- 6 James A. Coriden, *An Introduction to Canon Law*, New York 1991, 9.
- 7 Ken Parry and others (eds.), *The Blackwell Dictionary of Eastern Christianity*, Oxford 2001, xiv.
- 8 James A. Coriden, *An Introduction to Canon Law*, 11.
- 9 James A. Coriden, *An Introduction to Canon Law*, 11-12.
- 10 Ken Parry and others (eds.), *The Blackwell Dictionary*, xv.
- 11 James A. Coriden, *An Introduction to Canon Law*, 12.
- 12 James A. Coriden, *An Introduction to Canon Law*, 12.
- 13 Ken Parry and others (eds.), *The Blackwell Dictionary*, xv.
- 14 James A. Coriden, *An Introduction to Canon Law*, 13.
- 15 James A. Coriden, *An Introduction to Canon Law*, 13.
- 16 James A. Coriden, *An Introduction to Canon Law*, 13.
- 17 Ken Parry and others (eds.), *The Blackwell Dictionary*, xv-xvi.
- 18 James A. Coriden, *An Introduction to Canon Law*, 15-16.
- 19 James A. Coriden, *An Introduction to Canon Law*, 15-16.
- 20 James A. Coriden, *An Introduction to Canon Law*, 15-16.
- 21 Henry Chadwick and G.R. Evans (eds.), *Atlas of the Christian Church*, Oxford 1987, 58
- 22 Henry Chadwick and G.R. Evans (eds.), *Atlas of the Christian Church*, 58
- 23 Henry Chadwick and G.R. Evans (eds.), *Atlas of the Christian Church*, 58
- 24 John D. Faris, *Eastern Catholic Churches*, 9.
- 25 Henry Chadwick and G.R. Evans (eds.), *Atlas of the Christian Church*, 58
- 26 James A. Coriden, *An Introduction to Canon Law*, 13.
- 27 Constant Van de Wiel, *History of Canon Law*, Louvain, 1991, 31-32
- 28 H. K. Gallatin, "The Eastern Church", in Dr. Tim Dowley (eds.), *The History of Christianity*, Oxford 1977, 247.
- 29 H. K. Gallatin, "The Eastern Church", 259.
- 30 John D. Faris, *Eastern Catholic Churches*, 9.
- 31 John D. Faris, *Eastern Catholic Churches*, 9.
- 32 John D. Faris, *Eastern Catholic Churches*, 8-9.
- 33 Constant Van de Wiel, *History of Canon Law*, 127-137.
- 34 Constant Van de Wiel, *History of Canon Law*, 157-166.
- 35 Constant Van de Wiel, *History of Canon Law*, 167-168.
- 36 Ivan Zuzek, S.J., "Common Canons and the Ecclesial Experience in the Oriental Catholic Churches", *Understanding the Eastern Code, Kanonica* 8, Roma 1997, 216..
- 37 Mansi 49, 200 as cited in Ivan Zuzek, S.J., "Common Canons", 217. ,
- 38 Codification is an exercise in conceptual juridical abstraction. It strives to

reduce abstract formulations and arranged them in a carefully constructed system. This process has to be strong in clarity, brevity, consistency and order (Cfr., James A. Coriden, *An Introduction*, 26-27).

- 39 James A. Coriden, *An Introduction*, 27.
- 40 Constant Van de Wiel, *History of Canon Law*, 170-172.
- 41 AAS 27 (1935) 306-308
- 42 Ivan Zuzek, S.J., "Common Canons", 223-224.
- 43 *Nuntia* 1, 27-28
- 44 John D. Faris, *Eastern Catholic Churches*, 74
- 45 AAS 51 (1959) 65-69
- 46 Neophytos Edelby, "Unity or Plurality of Codes: Should the Eastern Churches have a Special Code?", *Concilium* 28 (1967) 42.
- 47 Neophytos Edelby, "Unity or Plurality of Codes", 43.
- 48 Neophytos Edelby, "Unity or Plurality of Codes", 43.
- 49 Neophytos Edelby, "Unity or Plurality of Codes", 43-44.
- 50 Neophytos Edelby, "Unity or Plurality of Codes", 44.
- 51 Ivan Zuzek, S.J., "Common Canons and the Ecclesial Experience in the Oriental Catholic Churches", *Understanding the Eastern Code*, *Kanonika* 8, Roma 1997, 218.
- 52 George Nedungatt, S.J. *The spirit of the Eastern Code*, 36; John Paul II, "Preface to the Latin Edition", *Code of canons of the Eastern Churches*, xxii.
- 53 Mansi 50, 31-32 as cited in Ivan Zuzek, S.J., "Common Canons", 218.
- 54 Hans Heimerl, "Outline of Constitution for the Church", *Concilium* 28 (1967) 59.
- 55 AAS 57 (1965) 988.
- 56 Hans Heimerl, "Outline of Constitution", 61-62.
- 57 Cf., Gauthier, The progress of the "Lex Ecclesiae Fundamental", *Studia Canonica* 12 (1978) 377-388.
- 58 Allocution of Paul VI to the cardinals and consultors of this pontifical commission, October 20, 1965 in AAS 57 (1965) 988.
- 59 Frederik R. McManus, "Canonical Overview: 1983-1999", in John P. Beal and Others (eds.), *The Commentary on the Code of Canon Law*, New York 2000, 12.
- 60 Frederik R. McManus, "Canonical Overview", 12-13.
- 61 AAS 57 (1965) 988; James A. Coriden, *An Introduction*, 35
- 62 *Communicationes* 2 (1969) 77- 85; Richard T. Cunningham, "The Principles Guiding the Revision of the Code of Canon Law", in *The Jurist* 30 (1970) 447-455.
- 63 Frederik R. McManus, "Canonical Overview", 12.
- 64 The 1983 Code itself has undergone just one formal amendment (the minor additions to c. 750 and 1371 introduced by the May 1998 Apostolic Letter *Ad tuendam fidem*) since its promulgation. However, many new documents and

official interpretation have enlarged and reshaped the canonical scene in the intervening years. The 1988 Apostolic Constitution on the Roman Curia, 1990 ritual for the celebration of marriage, the 1993 directory on ecumenism, 1996 apostolic Constitution on Papal elections, the 1998 *motu proprio* on Episcopal conferences and especially the 1990 Code of the Eastern Churches, as well as many other documents have influenced the meaning and practice of the canon law of the Latin Church. The Pontifical council on the Interpretation of Legislative Texts has issued dozens of authentic interpretations of the canons. Scores of decisions made by ecclesiastical tribunals have shed light on the meaning of particular canons... Thus a lot has changed in Canon Law of the Latin Church (cf. John P. Beal and others (eds.), "Editors' Preface" in *The Commentary on the Code of Canon Law*, xix).

- 65 Frederik R. McManus, "Canonical Overview", 11.
66 James H. Provost, "Pastor Bonus": Reflections on the Reorganization of the Roman Curia", *The Jurist* 48 (1988) 499-500.
67 John Paul II, Apostolic Constitution, *Pastor bonus*, June 28, 1988: AAS 80 (1988) 841-932.
68 Canon Law Society of America, *Code of Canons of the Eastern Churches* (appendix 2: *Pastor bonus* - English and Latin versions, 771-843) Washington 2001.
69 *Pastor bonus*, n. 13, 789. 70 *Pastor bonus*, 775-791.
71 *Pastor bonus*, 791-826.
72 James H. Provost, "Pastor Bonus", 507-508.
73 James H. Provost, "Pastor Bonus", 529.
74 *Nuntia* 1, 1-19. 75 *Nuntia* 3, 18-24.
76 *Nuntia* 3, 18-24: The journal was discontinued in 1990 after 31 issues.
77 Ivan Zuzek, S.J., "Common Canons", 224
78 *Nuntia* 28, 7.
79 John D. Faris, "An overview of the Code of Canons of the Eastern Churches", in John P. Beal and others (eds.), *The Commentary on the Code of Canon Law*, 30.
80 George Nedungatt, S.J. *The spirit of the Eastern Code*, 50-51
81 Ivan Zuzek, S.J., "Common Canons", 234.
82 *Nuntia* 9, 91-92; 11, 79, 84; 26, 17-99.
83 While presenting the CCEO in the Synod of Bishops Pope John Paul II said that canons are law but of a specific kind. In the true sense of the term the word *sacri canones*, traditionally used in the East, understood by them, in the sure faith that all the decisions made by the sacred pastors are sacred, since they hold the power, conferred on them by Christ and exercised under the guidance of the Holy Spirit for the good of the souls, who sanctified by baptism, constitute the one Holy Church (cf. George Nedungatt, S. J., *The Spirit of the Eastern Code*, 28)
84 John Paul II, *Sacri canones*, xxiv (Ivan Zuzek, S.J., "Foreword", in George Nedungatt, S.J. (ed.), *A Guide to the Eastern Code*, *Kanonika* 10, 2002, 31).

Women in the Church a Canonical and Pastoral Study

Rose McDermott

Women enjoy equality and dignity with men and cooperate in building up the Body of Christ in accordance with their condition and function. The author, quoting the magisterial teachings, critically analyses the juridical position of women in the present Codes of Canon Law as against the 1917 Code and in the teachings of the Second Vatican Council. She observes that some of the recent church documents recognize the increasing role of women in the church. Prof. Dr. (Sr.) Rose McDermott, SSJ, Dept. of Canon Law, Consultor to the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life; Book Review Editor for *The Jurist*, The Catholic University of America, Washington, D.C.20064, U. S. A.

Introduction

Few would doubt that conciliar and postconciliar teachings effected a significant change in the Church's perception of women eventually leading to revisions in canon law. Biblical and theological studies stressed the communal nature of the Church, the fundamental equality and dignity of persons, the sharing of all the baptized in the priestly, prophetic, and kingly function of Christ, and the universal call to holiness - all of which prompted a radical shift in ecclesial attitudes with corresponding revisions of ecclesiastical laws, particularly those that reflected an inferior juridical status for women. One can trace this gradual shift in the Church's perception and legislation through the antepreparatory and preparatory documents, conciliar discussions, and the definitive texts of the Council, e.g., *Lumen gentium* 32, *Gaudium et spes* 9, 29, 60, and *Perfectae caritatis* 15. As conciliar discussions continued, Pope John XXIII promulgated *Pacem in terris* addressing the social progress of

women and decrying the deprivation of their rights in many parts of the world.¹ When Pope Paul VI appointed the members of the Pontifical Commission for the Revision of the Code of Canon Law (PCCICR) in 1964, and the Pontifical Commission for the Revision of the Code of the Eastern Canon Law (PCCICOR) in 1972, he emphasized that the revised codes were to reflect not only the Church's legal tradition, but the new way of thinking (*novus habitus mentis*) expressed in the decrees of the Second Vatican Council.² Both principle six of PCCICR and principle eight of PCCICOR order the codes to affirm and protect the equality of all of the Christian faithful.³

Recent papal and other magisterial teachings have been quick to state that the exclusion of women from sacred orders in no way precludes their active part in the life and mission of the Church. Ecclesiastical authorities emphasize that the role of woman in the Church must be commensurate with her changing role in society. Many of these documents call for further study both in the theoretical understanding and practical implementation of women's proper role in the threefold mission of the Church. The absence of scholarly research regarding ordained⁴ and lay ministries and the capacity of the laity to exercise jurisdiction or the power of governance contribute to ambiguity in pastoral practice and impede the promotion of women in leadership roles in the Church.⁵ Likewise, clericalism and a radical feminism often preclude an unbiased and enthusiastic promotion of the laity, particularly women, in many roles of Church service.⁶

This short article will briefly examine the juridical condition of women in the revised common or universal law of the Church and recent magisterial teachings supporting women in the Church and society since the promulgation of the 1983 code. Likewise, it will suggest further revisions of selected canons in order that they reflect a more faithful expression of conciliar and postconciliar teachings and the more recent magisterial statements encouraging the promotion of women in the life and mission of the Church.

I. Women in General

A. Juridical Condition

With few exceptions, the laity, both men and women, share a common juridical status in the canons of the 1983 Code of Canon Law⁷ and the

1990 Code of Canons of the Eastern Churches.⁸ Women are recognized in law as members of the Christian faithful, baptized in Christ, incorporated into the Church, and constituted persons with duties and rights proper to Christians. Through baptism, each of the faithful in accord with her or his proper condition participates in the priestly, prophetic, and royal functions of Christ (CIC c. 204; CCEO c.7). As members of the Christian faithful, women enjoy true equality and dignity with men and cooperate in building up the Body of Christ in accordance with their condition and function (CIC c. 208; CCEO c. 11). Women are members of the laity or consecrated to God through the profession of the evangelical counsels by means of vows or other sacred bonds recognized and approved by the Church. Each spouse in marriage has an equal right and duty to those things which belong to the partnership of conjugal life (CIC c.1135; CCEO c. 777). As members of the Christian faithful, women share with men the fundamental rights and obligations of all believers set forth in canons 208-223 of the 1983 code and canons 10-26 of the Eastern code. With men women have a right to determine their domicile (CIC c. 104; CCEO c. 914) and establish associations of the faithful (CIC c. 299 §1; CCEO c. 573 §2).

B. Magisterial Teaching

The human dignity of women formed in the image of God, equal to men, and complementing them, as taught by the Second Vatican Council and promulgated in canon law, has permeated the Church's teaching on women since the 1983 code. Of primary concern for a more mature and just society are renewed emphasis on and support for women in marriage and family life. Conciliar and postconciliar teachings repeatedly emphasize the importance of the family as the *domestica ecclesia*⁹ and the core of the Christian community. The home is the first school for children, and parents are their primary teachers through their witness and example in this basic community of society. Church leaders have taken cognizance of the profound changes affecting the condition of women. Profound changes in women's condition have to be considered for their own good and familial and social structures. Women have great contributions to make to society, but their primary role as wife and mother ought to be given serious consideration. Often those who choose to remain at home and dedicate themselves to raising their children are targets for discrimination and affronts to human dignity. Yet it is precisely they who contribute the most to the development of society.¹⁰

Repeatedly, the Church condemns all customs, laws and practices in society that deprive women of their true dignity as human beings formed in God's image.¹¹ In many countries the inalienable rights of women have not been respected, nor have women taken the place which God designed for them in salvation history. Disregard for their rights takes both subtle and blatant forms such as: discrimination, segregation, marginality, illiteracy, poverty, exploitation, abuse, prostitution, pornography, mutilation, abortions of unborn females, and women as commodities in entertainment and tourism.¹² Often women bear the burden of work in many cultures but are prohibited from participating in the social, political, and economic life of the country. While the women are the sole providers of food for their families in many developing countries, they have no input in decisions that affect their labors.¹³ In developed countries, women supply a great deal of the labor force and contribute to building up society; yet they are often discriminated against in the work place; they do not receive just remuneration for their work and are often first to lose jobs that support their families. Often their bargaining for advancement in work comes at the expense of their own dignity or involves the neglect of familial responsibilities.¹⁴

Ecclesiastical authorities are committed to promoting the rights of women through articulating the teachings of the Gospel and challenging anything in ecclesial or other societal structures that demeans women. The Church places her resources at the service of women in the postmodern world in order to clarify and protect their rights. In some countries, episcopal conferences have established commissions to work with government officials in addressing such issues; in other countries, the Church has called for legislation at the national and international levels to address the rights of women. Official Church documents call particular attention to promoting the education and culture of young girls and women. Both are important in protecting them from spiritual, psychological, and physical abuses such as: illiteracy, forced marriages, unsolicited sterilization, inadequate health care, exploitative work practices, and numerous other injustices supported by the structures of the societies in which these women live.¹⁵

II. Women in the Teaching Function of the Church

A. Juridical Condition

Both CIC canon 766 and CCEO canon 610 §4 provide that lay

persons, men or women can be permitted to preach in a church or oratory in extraordinary circumstances, if necessity requires it, or it seems advantageous in particular cases in accord with the prescripts and mandates of ecclesiastical authorities without prejudice to the prescriptions for the homily (CIC c. 767 §1; CCEO c. 614 §4). Both codes acknowledge the primary right and obligation of parents to provide for the education of their children (CIC c. 793 §1; CCEO c. 627 §1), while other members of the laity can provide formal catechesis (CIC 776; CCEO CC. 618, 624 §3). Both codes state the right of the laity to acquire a fuller understanding of the sacred sciences, even to pursuing academic degrees. Suitable lay persons are qualified to receive a mandate from competent ecclesiastical authority to teach the sacred sciences (CIC c. 229 §2, §3; CCEO c. 404 §2, §3). Laity can be included among those selected as censors for judging books by the proper ecclesiastical authorities (CIC c. 830 §1; CCEO c. 664 §1).

B. Magisterial Teaching

Recent magisterial statements acknowledge that women have been recognized as transmitters of the faith since the very beginnings of Christianity. Christ sent forth the Magdalene and the Samaritan woman to carry the good news to believers and non-believers alike. The documents of special synods of bishops emphasize the need for the gifts of women to be employed in the prophetic mission of the Church, particularly in teaching and evangelizing.¹⁶ The canonical norms cited above validate the recognition and employment of women in various areas of education such as catechesis, sacramental preparation, missionary activity, and higher education. Both statements from synods and curial documents encourage competent women to pursue studies in theology and related disciplines in order to be co-partners with men in seminary formation and education, as well as in other higher institutions of learning. The magisterium recognizes the skills of women in ecumenical dialogues and in the preparation of missionary documents.¹⁷

III. Women in the Sanctifying Function of the Church

A. Juridical Condition

In both codes the laity have the right to participate in their own way in liturgical celebrations (CIC c. 835 §4; CCEO c. 403 §1). Both codes permit the laity to baptize in case of necessity in the absence of the

ordinary ministers of baptism (CIC c. 861 §2; CCEO c. 677 §2).¹⁸ Lay members of the Christian faithful can fulfill the functions of lector, commentator, cantor, and other liturgical services in accord with the norm of law in the Latin church (CIC cc. 230 §2). When ministers are lacking and the need of the Church requires it, the laity can exercise the ministry of the word, preside over liturgical prayers, confer baptism, and distribute holy communion in accord with the provisions of law (CIC c. 230 §3). In the absence of priests and deacons, a diocesan bishop can delegate suitable lay persons to assist at marriages with the favorable vote of the bishops' conference and the permission of the Apostolic See (CIC c. 1112).¹⁹ With the permission of the local ordinary, qualified lay persons can administer certain sacramentals in accordance with the prescribed liturgical books (CIC c. 1168).

The Eastern code, sensitive to the particular laws of the various churches *sui iuris*, provides that lay persons have the right to participate actively in the liturgical celebrations of any church *sui iuris* whatsoever, according to the norm of the liturgical books. Likewise, certain functions may be committed to lay persons in accordance with the norm of law when true necessity and genuine advantage recommend it (CCEO c. 403 §1, §2).

B. Magisterial Teaching

Conciliar teachings have stressed the communal nature of the liturgy and the active participation of all the Christian faithful in the rich diversity of liturgical functions. In order that liturgical actions be truly celebrations of a holy people gathered under the diocesan or eparchial bishop, women should be encouraged to take an active role in liturgical worship in the Church, the sacrament of unity.²⁰ However, a study of recent magisterial documents reveals few statements on the role of women in the sanctifying function of the Church. This is not surprising, given the firm and constant tradition of distancing women from sacred ministers, the altar, and liturgical participation in general. A few documents recognize the temporary designations of women as lectors, commentators, cantors, special ministers of holy communion and altar servers.²¹

The predominant issue in the ongoing discussion of the legal condition of women in the Church, particularly in her sanctifying function, is woman's exclusion from orders (CIC c. 1024; CCEO c. 754)

which precludes her capacity for the full care of souls and the exercise of ecclesiastical power of governance (CIC c. 129 §1; CCEO c. 979 §1), even though both codes provide that the laity can cooperate in the exercise of jurisdiction (CIC c. 129 §2; CCEO c. 979 §2) in accord with the prescripts of law. Orders and eligibility for jurisdiction distinguish sacred ministers or clerics from the laity (CIC c. 207 §1; CCEO c. 323) and women are prohibited from testing a vocation to sacred ministry in the Catholic Church. Biblical scholars, theologians, historians, and ecclesiastical authorities have addressed the issue of women's ordination for at least the last thirty years.²² On May 22, 1994, John Paul II in an apostolic letter, *Ordinatio sacerdotalis* stated that the Church does not see herself as having the power to ordain women to the priesthood.²³ However, the ordination of women remains a significant issue in ecumenical dialogues with other churches and ecclesial communities.

IV. Women in the Governing Function of the Church

A. Juridical Condition

Both codes provide for the laity in the governing function of the Church. Sacred pastors can admit lay persons with the necessary knowledge, experience, and integrity as experts or consultants either as individuals or members of various councils at the parochial, diocesan/eparchial and patriarchal levels of the various churches. Likewise, they can be deputed to exercise other ecclesiastical offices and functions in accord with the norms of law with the exception of those offices and functions requiring sacred orders (CIC c. 228; CCEO 408). The Latin code provides that a lay person, man or woman, can represent the Apostolic See as a delegate or observer at international councils, conferences, or meetings (CIC c. 363 §2). Women can be appointed as chancellors or vice-chancellors in the diocesan curia of the Latin church (CIC c. 482 §1, §2). While the chancellor must be a presbyter or deacon in Eastern churches (CCEO cc. 123 §1, 152, 252 §1), the law does not seem to require sacred orders for the office of vice-chancellor (CCEO cc. 123 §1, 152, 252 §2). Lay persons can be appointed as notaries in both codes (CIC cc. 482 §3, 483 §1; CCEO cc. 123 §2, 152, 253). The diocesan or eparchial bishop can appoint lay persons of outstanding integrity who are expert in financial affairs and civil law to the diocesan/eparchial finance council (CIC 492 §1; CCEO c. 263 §1); likewise, the same bishop can appoint lay persons of integrity with financial expertise

as diocesan/eparchial finance officer (CIC c. 494 §1; CCEO c. 262 §1). Both codes make provisions for appropriate ecclesiastical authorities to appoint a qualified non-ordained member of the Christian faithful as a judge in a collegiate tribunal (CIC c. 1421 §2, §3; CCEO c. 1087 §2, §3). In any trial a sole judge can employ two assessors, members of the Christian faithful of upright life, to serve as his consultors (CIC c. 1424; CCEO c. 1089). The diocesan/eparchial bishop can approve suitable lay persons for the function of auditor (CIC c. 1428 §1, §2; CCEO c. 1093 §1, §2). The presiding judge may designate a lay judge of the collegiate tribunal as *ponens* or *relator*, who presents the case at the judicial meeting and puts the judgment in writing (CIC 1429; CCEO 1091 §2, §3). A lay person can be appointed as a promoter of justice (CIC c. 1430; CCEO c. 1094) or a defender of the bond in a diocese or eparchy (CIC cc. 1432; CCEO c. 1096). CIC c. 443 §3, 2°. §4, §5 provides for the laity to take part in a particular council with a consultative vote. The diocesan or eparchial bishop can designate members of the laity to take part in the diocesan pastoral council, a consultative body of the diocese/eparchy (CIC c. 512; CCEO c. 273). The Latin code provides that due to a shortage of priests, the diocesan bishop can entrust a lay person or a community of persons with the pastoral care of a parish (CIC c. 517 §2). Laity can be members of the parish pastoral council and the parish finance council to assist the parish priest in the pastoral care and administration of the temporal goods of the parish (CIC cc. 536 §1, 537; CCEO 295). The two codes provide that lay persons can function as administrators of public juridic persons (CIC cc. 1279, 1287; CCEO c. 1023).

B. Magisterial Teaching

While recent documents recognize the potential of women in the formulation of policies and in decision-making bodies in the Church, meager creative pastoral planning has been undertaken to augment their participation in such decision-making in the Church. Where women have functioned as chancellor, financial officer, tribunal judge, director of Catholic Charities, delegate for religious, and pastoral directors of parishes, they experience a deep sense of vocation or calling to Church service, employ a collaborative work style, share their unique gifts and talents, and exert considerable influence on both the ecclesial and civil communities.²⁴ Since ecclesiastical authorities have always acknowledged

a dependence on women throughout the history of the Church in areas of education, health care, social services, and missionary activity,²⁵ their experience in these critical areas would seem to be invaluable in policy and decision-making at the parochial and diocesan or eparchial levels of particular churches.

Women religious, especially, want greater involvement in the structures and decisions that affect their lives and of those they serve. They are educated, articulate, and dedicated to God and his people. Many of them, particularly those in institutes committed to the missions, are all too keenly aware of the oppression and inferior status of women in various cultures. These religious work towards systemic change and understand that recognition of the dignity of woman as the first step in the promotion of her participation in the Church and society.²⁶ While institutes of women religious have enormous human and financial resources to contribute to the mission of the Church, it remains to be seen how the particular churches will find the means to support committed laity unable to provide the needed formation and education for themselves.²⁷ This will be a critical issue in the not too distant future with the scarcity of religious vocations.

V. Residual Discriminatory Canons

A. CIC

While the present legislation of the Latin church shows significant improvement in the ecclesial perception and juridical condition of women vis-à-vis the former law, there remain a few seemingly discriminatory norms. In CIC canon 230 §1 only laymen (*virī laici*) can be formally installed as lectors or acolytes. This norm seems clearly inconsistent with conciliar and postconciliar teachings, since Pope Paul VI in his *motu proprio, Ministeria quaedam*, August 15, 1972, proclaimed the functions of lector and acolyte as lay ministries in the Church without making any distinction between men and women.²⁸ The canon on cloister in book two, part three on consecrated life continues a discriminatory stance towards nuns, women religious professing solemn vows and dedicated to contemplation. These religious do not have the same freedom in providing for their own cloisteral regulations as male religious having the same juridical status (CIC c. 667 §2, §3, §4). While male religious can structure the cloister of their monasteries in their proper law (CIC c. 667 §2), the cloister of nuns is regulated by papal norms

(CIC c. 667 §3) and the instruction, *Verbi sponsa*.²⁹ This discriminatory treatment of nuns persists despite the determination of the *coetus* on consecrated life to avoid any inequality of treatment between institutes of consecrated life of men and of women, unless necessitated by the nature of the matter or some peculiar situation;³⁰ canon 586 §1 acknowledging an autonomy of life for individual institutes; canon 606 stating that the norms for institutes of consecrated life and societies of apostolic life apply equally to both sexes, unless determined otherwise from the context or the nature of things; and *propositum* 22 of the ninth ordinary session of the synod of bishops registering the synodal fathers' concern for the autonomy of monasteries of nuns and the authority of their major superiors.³¹ While John Paul II stated that careful consideration would be given the synodal members' request to give more authority to major superiors of monasteries of nuns,³² the instruction, *Verbi sponsa*,³³ seems to fall far short of the synodal fathers' proposal and the pope's promise.

B. CCEO

For the most part, the norms in the common law for the Eastern churches reflect conciliar and postconciliar teachings on the fundamental equality and dignity of women. Given the sensitivity and the provision of the legislator for the particular law of the Eastern churches, a thorough study of the issue would require a review of the legislation of the twenty-one churches *sui iuris*. However, there are areas where the Eastern law reflects an overly male-oriented perspective. In the universal law, a wife can transfer to the church of her husband at the celebration of or during the marriage; however, there is no such provision for the husband transferring to the church of his wife (CCEO c. 33). Marriage is celebrated preferably before the pastor of the groom (CCEO 831 §2) unless particular law determines otherwise or a just cause excuses. When the spouses are of two different churches *sui iuris*, the children are enrolled in the church of the father, unless only the mother is a Catholic or both parents agree they should be enrolled in the church *sui iuris* of the mother (CCEO c. 29 §1).

Ordination to the presbyterate or diaconate is a requisite for the office of chancellor at the patriarchal, archiepiscopal, and eparchial levels of the church (CIC cc. 123 §1, 152, 252 §1). There is no provision in the CCEO for women to be entrusted with the pastoral care of parishes as in

the Latin church (CIC c. 517 §2). The Eastern code restricts the ministries of lector and acolyte constituted on a stable basis to men, since these ministries are still considered minor orders (CCEO c. 327).

Conclusion

This article attempted to show the enhanced juridical condition of women in the Church derived from conciliar and postconciliar teachings and the fidelity of ecclesiastical authorities at the universal level in promoting women's dignity, equality, and rights both in the Church and society over the past twenty years since the promulgation of the 1983 code. John Paul II, the synodal fathers, and the prefects of Roman dicasteries have continued to teach and support women as wives and mothers, productive members of society, and co-partners with men in responsibility for the world and its resources.

However, the failure of the Second Vatican Council to resolve the relationship of the power of governance or jurisdiction to sacred orders has resulted in a certain ambiguity regarding the public function of lay men and lay women both in ecclesiastical law and pastoral practice.³⁴ Such ambiguity in law and practice often precludes the deputation of gifted and qualified lay persons, particularly women, to certain functions in the Church. The universal law provides that the laity can cooperate in the power of governance in accord with the norms of both codes (CIC c. 129 §2; CCEO c. 979 §2). During the ninth ordinary session of the synod of bishops on consecrated life, the members of the synod proposed that juridical recognition be given to "mixed" religious institutes in which, according to the intention of the founder, clerical and lay members enjoy equal rights and responsibilities, apart from sacred orders. The synodal fathers further proposed that if the general chapter of a "mixed" institute requested, the offices in the government of the institute would remain open to all members without distinction.³⁵ *Proponitur insuper, capitulis generalibus id petentibus, munera gubernationis aperta maneant omnibus sine discriminatione.* In lay religious institutes major superiors and chapters perform all of the executive and legislative acts carried on by the major superiors and chapters of clerical religious institutes, exclusive of those requiring sacred orders.³⁶ Today, many diocesan and eparchial bishops have decided that the universal or common law permits them to delegate the power of governance to suitable and competent lay persons. This particular issue calls for further

scholarly research leading to greater legal precision. Such a study would also offer a better understanding and distinction of clerical and lay ministries. Finally, it would enable talented and gifted lay persons, particularly women, to serve the Church in a much broader spectrum of ministerial service.³⁷

Foot Notes

- 1 Rose McDermott, *The Legal Condition of Women in the Church Shifting Policies and Norms*. Canon Law Studies No. 499. (Washington, D.C.: The Catholic University of America, 1979) 153-155, 299-302.
- 2 Pope Paul VI, alloc. to PCCICR, November 20, 1965, *Communicationes* 1 (1969) 41; id., alloc. to PCCICOR, March 18, 1974, *Nuntia* 1 (1975) 6-7.
- 3 Pontificia Commissio Codici Iuris Canonici Recognoscendo, "Principia Quae Codicis Iuris Canonici Recognitionem Dirigant," *Communicationes* 2 (1969) 82-83; Pontificia Commissio Codici Iuris Canonici Orientalis Recognoscendo, "Guidelines for the Revision of the Code of Oriental Canon Law," *Nuntia* 3 (1976) 22-23.
- 4 Daniel Donovan, *What are they saying about the ministerial priesthood?* (Mahwah, NJ: Paulist Press, 1992) 2. The author notes that the study of ordained ministry has implications in areas such as christology, pneumatology, ecclesiology, as well as sacramental and liturgical theology.
- 5 John P. Beal, "The Exercise of Jurisdiction by Lay Religious," *Bulletin on Issues of Religious Law* 13 (Winter 1997) 1-6; id., "The Exercise of the Power of Governance by Lay People: State of the Question," *The Jurist* 55 (1955) 1-92; John M. Huels, O.S.M., "The Power of Governance and Its Exercise by Lay Persons: A Juridical Approach," *Studia canonica* 35 (2001) 59-96..
- 6 John Paul II, "The Priority of the Ecumenical Vocation," *Origins* 15/2 (May 30, 1985) 27-28; id. in Belgium, "To be Disciples," *Origins* 15/3 (June 6, 1985) 46-48; Synod of Bishops, "A Message to the People of God," *Origins* 15/27 (December 19, 1985) 441, 443-444; John Paul II, ap. ex. *Christifideles laici* (CL), December 30, 1988, AAS 81 (1989) 393-521. English translation in *Origins* 18/35 (February 9, 1989) 561, 563-595, esp. 584-587; id., *ad limina* address, "On Parishes, Lay Ministry and Women," *Origins* 23/8 (July 15, 1993) 124-126.
- 7 *Codex Iuris Canonici (CIC) auctoritate Ioannis Pauli PP. II promulgatus* (Vatican City: Libreria Editrice Vaticana, 1989); English translation, *Code of Canon Law Latin-English Edition* New English Translation (Washington, D.C.: Canon Law Society of America, 1999).

- 8 *Codex Canonum Ecclesiarum Orientalium (CCEO) auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione auctus* (Vatican City: Libreria Editrice Vaticana, 1995); English translation, *Code of Canons of the Eastern Churches Latin-English Edition New English Translation* (Washington, D.C.: Canon Law Society of America, 2001).
- 9 LG 11.
- 10 "Vocation and Mission of the Laity, Working Paper for the 1987 Synod of Bishops," *Origins* 17/1 (May 21, 1987) 5-6, 13; "Population Trends" in *Origins* 24/10 (August 4, 1994) 183-184; Asian, Middle Eastern Bishops, "Serving the Needs of Families," *Origins* 25/6 (June 22, 1995) 99.
- 11 John Paul II, ap. ex. *Ecclesia in Africa (EaAf)*, September 14, 1995: AAS 88 (1966) 5-82. English translation in *Origins* 25/16 (October 5, 1995) 249, 251-276, see esp. 271.
- 12 John Paul II, "Pope in Switzerland," *Origins* 14/7 (June 28, 1984) 101 (margin notes); id., "From the Justice of Each comes Peace to All," *Origins* 27/28 (January 1, 1998) 469; Suzanne Scorsone, Vatican UN Delegation, "Empowering Women," *Origins* 27/40 (March 26, 1998) 677-679; John Paul II, "Appeal on Behalf of Women," *Origins* 27/40 (March 26, 1998) 679; Synodus Episcoporum (Coetus specialis pro America, 1997), Elenchus finalis Propositionum, December 11, 1997 in EV 16 (1997) prop. 11, #1717; Pontifical Council for Justice and for Peace, *Per una migliore distribuzione della terra. La sfida della riforma agraria*, November 23, 1997, EV 16 (1997) ##1401-1402; Synodus Episcoporum, (Coetus specialis pro Asia), Elenchus finalis, Propositionum, May 12, 1998 in EV 17 (1998) prop. 35, ##737-740; Synodus Episcoporum, (Coetus specialis pro Oceania), Elenchus finalis propositionum, December 11, 1998, in EV 17 (1998) prop. 27, ##1978-1980; John Paul II, apos. exhor., "Ecclesia in America," in *Origins* 28/33 (February 4, 1999) 580.
- 13 John Paul II, to Austrian workers, *Origins* 13/16 (September 29, 1983) 275; Pontifical Council Cor Unum, "World Hunger," *Origins* 26/21 (November 7, 1996) 336; Pontifical Council for Social Communications, "Ethics in Advertising," *Origins* 26/38 (March 13, 1997) 630; Special Synod for America: "The Working Paper," *Origins* 27/13 (September 11, 1997) 213; Oceania in EV 17 (1998) prop. 27, ##1978-1980.
- 14 John Paul II in Austria, "Christian Solidarity Leads to Action," *Origins* 13/16 (September 29, 1983) 275; Report, "Women Religious Meet with Pope to Discuss Their Life," *Origins* 13/29 (December 29, 1983) 486; John Paul II in Australia, "A Meeting with the Unemployed," ("Unemployed in Australia") *Origins* 16/26 (December 11, 1986) 480; Cardinal Thiandoum, "The Tasks of the Special Synod for Africa," *Origins* 23/44 (April 21, 1944) 769; Pontifical Council for Culture, "Toward a Pastoral Approach to Culture," ("Approach to Culture") *Origins* 29/5 (June 17, 1999) 74.

- 15 John Paul II, "Appeal to the Church on Women's Behalf," *Origins* 25/12 (September 7, 1995) 185, 187-191; id., World Day of Peace Message, "Respect for Human Rights: The Secret of True Peace," *Origins* 28/28 (December 24, 1998) 491; id., *EcAs, Origins* 29/23 (November 18, 1999) 380.
- 16 Special session of the Synod of Bishops to Africa, "An Overview: Midpoint in the Synod for Africa," *Origins* 23/46 (May 5, 1994) 807; John Paul II, apos. exhor., *Vita consecrata* (VC) *Origins* 25/41 (April 4, 1996) 699; id., *EcAs, Origins* 29/23 (November 18, 1999) 380.
- 17 John Paul II, *EcAs, Origins* 29/23 (November 18, 1999) 380; id., "Appeal to the Church on Women's Behalf," *Origins* 25/12 (September 7, 1995) 185, 187. Mary Ann Glendon, "Vatican Stance: Women's Conference Final Document," *Origins* 25/15 (September 28, 1995) 233, 235-236. Pontifical Council for Christian Unity, "The Ecumenical Dimension in the Formation of Pastoral Workers," *Origins* 27/39 (March 19, 1998) 653, 655-661.
- 18 CIC c. 861 §2 states any person (*quilibet homo debita intentione motus*), while CCEO c. 677 §2 states any other Christian faithful (*vel cuilibet alii christifideli*).
- 19 In the Latin church the spouses are regarded as the ministers of the sacrament of matrimony; the blessing of the priest is not required for the validity of the sacrament as in the Eastern churches.
- 20 *SC* 14, 26-32.
- 21 Congregation of Divine Worship and Discipline of the Sacraments, cir. let., *Credo doveroso*, March 15, 1994, Prot. n. 2482/93, in *EV* 14 (1994-1995) 305-307. See also *Origins* 23/45 (April 28, 1994) 777, 779.
- 22 In 1976, the *coetus de clericis et de magisterio ecclesiastico* planned to draft legislation reinstituting the order of deaconess in the Eastern churches. See *Nuntia* 5 (1977) 63. However, in 1977, the *coetus centralis* decided that the question needed more study due to the CDF decl. *Inter insigniores*, October 15, 1976, AAS 69 (1976) 98-116; *Origins* 6 (February 3, 1977) 517, 519-524, restating the prohibition of women priests, but leaving open the question of women deacons.
- 23 John Paul II, ap. lett. *Ordinatio sacerdotalis*, May 22, 1994; AAS 86 (1994) 545-548. English translation in *Origins* 24 (June 9, 1994) 49., 51-52. See also the October 28, 1995 Congregation for the Doctrine of the Faith's affirmative response to the *dubium* as to whether the doctrine contained in the apostolic letter to be definitively held is understood as belonging to the deposit of faith: AAS 87 (1995) 1114. English translation in *Origins* 25 (November 30, 1995) 401, 403.
- 24 See, for example, Anne Munley, I.H.M. et al., *Women and Jurisdiction An Unfolding Reality The LCWR Study of Selected Church Leadership Roles*. (Silver Spring, MD: LCWR, 2001) 99-108.
- 25 Synod of Bishops, *lineamenta*, "Consecrated Life in the Church and in the World," *Origins* 22/26 (December 10, 1992) 440.

- 26 VC 57.
- 27 Munley, 104-105.
- 28 Pope Paul VI, m.p. *Ministeria quaedam*, August 15, 1972: AAS 64 (1972) 529-534. See Julio Manzanares, "Los nuevos ministerios de lector y acólito." *Revista Española de Derecho Canonico* 29 (1973) 377.
- 29 Congregation for Institutes of Consecrated Life and Societies of Apostolic Life, *Verbi sponsa* (VS), "Instruction on the Contemplative Life and on the Enclosure of Nuns." (Vatican City: Libreria Editrice Vaticana, 1999).
- 30 Pontificia Commissio Codici Iuris Canonici Recognoscendo, Schema Canonum De Institutis Vitae Consecratae Per Professionem Consiliorum Evngelicorum (Reservatum) (Rome: Typis Polyglottis Vaticanis, 1977) xiv: "Praeter praedicta principia directiva vitatur quoque in Schemate quaelibet disparitas tractationis non omnino necessaria ex nature rei vel ex peculiari quadam conditione inter Instituta vitae consecratae virorum et illa mulierum."
- 31 Proposte della IX Assemblea generale ordinaria del Sinodo dei vescovi sulla vita consacrata e la sua missione nella chiesa e nel mondo, October 28, 1994: *Enchiridion della Vita Consacrata Dalle Decretali al rinnovamento post-conciliare (385-2000)* (EnchVC). (Milan: Ancora Editrice, 2001) Prop. 22:3116.
- 32 VC 59.
- 33 VS 26e states, "In the new vision and perspective in which the Church today envisages the role and presence of women, it is necessary to overcome, wherever it may still exist, that form of juridical supervision by Orders of men and regular Superiors, which *de facto* limits the autonomy of monasteries of nuns." However, the juridical supervision of diocesan bishops over *sui iuris* monasteries of nuns continues.
- 34 See note 5 for articles on the issue of jurisdiction.
- 35 EnchVC, Prop. 10:3104: "De institutis mixtis - Ad dignitatem et identitatem propriam vitae religiosae virorum roborandas, publice agnoscatur existentia institutorum mixtorum, id est, illorum in quibus, secundum propositum fundatoris, aequales sint religiosi sive clerici sive non clerici 'pari ratione paribusque iuribus et obligationibus, salvis iis quae ex ordine sacro proveniunt' (Perfectae caritatis, n. 15).
- 36 Beal, 2-6.
- 37 Philip Murnion, "Shaping the Parish of the Future," *Origins* 28/31 (January 21, 1999) 546. Murnion reports that in 1997 in the United States, there were 26, 000 members of the laity in parish ministry in the Latin church, a twenty-two percent increase since 1992. Eighty-two percent of these were women. Of these 26,000, 550 lay persons or religious were responsible for the pastoral care of a parish in the absence of a pastor.

Laws and Judicial Activism in India

P.D. Mathew

The Indian constitutional provision for judicial activism brings justice to the poor and the oppressed. The author narrates the circumstances, which forced our court to play an activist's role. The role of judges in interpreting the constitution is crucial to the people. Every interpretation must be guided and inspired by the social philosophy and values of the Constitution. The author also introduces the rationale of Public Interest Litigation meant to safeguard Fundamental Human Rights. Adv. Fr. P. D. Mathew S.J., Director, Legal Aid, Indian Social Institute, New Delhi-110 003, India.

Introduction

One of the best things that has happened in the legal and judicial world in our country in the recent years is the emergence of social action and social reform through judicial activism and Public Interest Litigation (PIL). Until then justice was a remote reality for our illiterate, underprivileged and exploited masses. Poor could not take recourse to the courts of law for relief because of lack of means and courts were beyond their reach. Only the rich could take advantage of the rights guaranteed by the Constitution and the laws. In such a situation a few Supreme Court judges began a dynamic approach to the interpretation of the Constitution and laws. Interpretation of the concept of "locus standi" by the Supreme Court has first removed the major hurdle facing the poor and has paved the way for easy access to courts of justice. This new approach to bring justice to the poor and the oppressed through radical interpretation of the fundamental rights guaranteed by the Constitution is known as judicial activism and cases filed in the Constitutional courts by public spirited persons or organizations on behalf of the poor, the oppressed and the illiterate to enforce their

fundamental rights is termed as Public Interest Litigation. They are interrelated. Judicial activism in fact is developed through court rulings in public interest litigations.

Indian Constitution recognizes an independent and strong judiciary as one of the main pillars of democracy. Among the courts in the country the Apex Court is vested with a special humanizing jurisdiction. It can pass such decree or make such order as is necessary for giving complete justice in any case or matter pending before it. Judge's role is to deliver justice and not merely to interpret law in a passive manner. They are expected to translate the promises contained in the Directive Principles of the Constitution and thereby create fresh constitutional norms. This is what the judiciary has done by playing an activist's role. In many cases the Apex Court exercised its jurisdiction with courage and conviction, creativity and circumspection giving proof of vigilance and practical wisdom through the process of judicial activism. Judges as public crusaders came forward to clean up the democratic institutions which were being abused, manipulated and exploited by vested interests for self gains. They have positively used the judicial activism for the institutional growth of democracy and the common good of the people.

Social transformation in India is possible only through mass awakening and social action of the people. Courts and judges can play a major role to activate and accelerate it. To rely entirely on judiciary for social changes is a wishful thinking as it has its own limitations as a wing of the government. Hence judicial activism and PIL movement must be seen as supportive elements for social transformation and promotion of justice.

Historical Development of Judicial Activism in India

The expression "judicial activism" is not found in the Constitution of India. But the Constitution makers have given birth to its development by conceiving an independent judiciary having the power of judicial review, which is considered as a permanent and basic feature of our Constitution. In fact judicial activism is an off-spring of judicial review in one form or other.

Powers of judicial review have been conferred on the upper judiciary by the Constitution under Articles 13, 32, 142, 144 and 226. While drafting our modern Constitution our Constitution makers have consulted

several democratic constitutions, especially of the western countries and have adopted the best democratic principles of governance contained in them to meet the needs and challenges of the Indian situation. As regards the power of the judiciary, India has mostly adopted the model of USA where the judiciary has assumed supremacy under its power of interpretation of the Constitution of USA. Thus the American judiciary has a supremacy over the Legislative policy of the Government.

Immediate Reasons for Judicial Activism

To understand judicial activism we must first see the circumstance which forced our courts to play an activist's role. Democratic system of government can flourish only when democratic institutions function effectively. Of late there were instances where politicians and bureaucrats were not doing enough for the welfare of the people. Sensitive issues were not attended to in time. Corruption was also eroding the basic structures and their functions. In such a situation people were forced to seek help from the judiciary. So in the net result the courts were compelled to take up the issues which they have traditionally not touched.

In other words, lack of concern by the Legislature for some pressing problems of the people and the near absence of responsible and responsive governance by the executive have compelled the court to enforce the rights of citizens through novel and innovative strategies so as to meet the needs of the crying people. This phenomenon of a dynamic role played by the judiciary to deliver justice to the millions of illiterate, ignorant and suffering humanity is termed by many socially committed people as "judicial activism". Since judicial activism is not a clearly defined term, different persons understand it in different sense.

Another reason for the development of judicial activism is the realization of some judges of their role to interpret laws in a dynamic way to meet the changing needs of the times. In several cases in the past the judges treated the law as a living organism and interpreted it in a dynamic way to deliver justice to the needy. That is the spirit in which judges engage in activism even today.

Our judiciary does not exercise the extreme judicial supremacy as practiced by the American judiciary. However it exercises the right to declare any law unconstitutional if it violates the fundamental right of any citizen or any other statutory provisions of the Constitution. India

is governed by the Rule of Law framed by the legislature and implemented by the executive. But the function of interpretation of the law is entrusted to the upper judiciary. Though law is sovereign its effectiveness on society depends on its dynamic interpretation by the court. Only in the recent past the judiciary played a major and dynamic role in the various interpretations of law for the common good and social change, keeping in view the constitutional goal and spirit. This is the background in which judicial activism in India developed into maturity. The judiciary realized that in the context of poverty, illiteracy, corruption, exploitation and injustice judicial activism is a *sine qua non* of democracy. It felt that the primary function of the judiciary is not only to punish the wrongdoers and to decide the dispute among private individuals, but also to interpret laws in the ever changing circumstances to the best advantage of common people and for promoting socio-economic justice. As guardian of the Constitution and keeper of the conscience of the nation it took up on itself the duty of responding positively to situations where the legislature and the executive operated contrary to law and the interests of the common people or failed to do justice. Turning a blind eye to the injustices and sitting idle were considered as *adharma* from its part.

Creative Role of Judges in the Interpretation of the Constitution

What is the role of judges in a democratic system of government in the law making function as Justices of the Apex Court? There is an ongoing discussion on these fundamental questions among the legal scholars, judges, lawyers, political scientists and social activists.

There are many conservative appellate justices who believe that judges role is subsidiary to that of the real policy-forming instruments of the government, the legislature and the executive. According to them their role is merely to interpret and apply the law as promulgated in the Constitution, statutes and precedents.

This traditional and conservative view no longer holds good. In England, many outstanding judges like Holt, Mansfield, Blackburn, Wright and Atkin transformed common law by their creative approach and dynamic interpretations.

Many progressive judges today advocate the law-making role of the judges. They believe that law-making is an inherent and inevitable part of the judicial process. There is ample scope for a judge to develop and mould law even when he is directly concerned only with the interpretation of a statute. A judge can infuse life into the legal skeleton provided by the legislature and make it capable of meeting the needs of the society. Thus moulding the law capable of serving the society is considered a creative work of a judge today.

Interpretations of statutes by judges are crucial to the people. Only they must be consistent with democratic principles and constitutional values. They are also under an obligation to explain to the people their philosophy of interpretation of the Constitution and the laws. They must make their judgments and constitutional interpretations available to public scrutiny. This will also enable the common people to understand how the courts and judges function constructively.

Today the judges have an active and creative role to play in performing their judicial functions. They must interpret and apply the law in a manner that will promote social justice. This means that they must go beyond the bureaucratic tradition of interpreting the Constitution for furthering the values enshrined in it by the founding fathers. Judges should not interpret laws in a mechanical manner unconcerned with the consequences of their decisions. They cannot simply ignore the people who come to them for justice and interpret the law when they know that their interpretation will perpetuate injustice. It is for this reason that when a law comes before a judge, he has to invest it with meaning and content. His creativity is the most expected attribute or characteristic of judicial function in Constitutional interpretation.

Creativity on the part of judges demands from them fuller apprehension of changing social needs of the people, especially of the marginalized sections of society. Since the Constitution has a socio-economic mission as its goal, the judges must always keep in mind the hopes and inspirations of the common people and the changing needs of the society while interpreting it. They are under an obligation to participate by taking a creative approach in the realization of 'rising expectations' of the masses.

The new consciousness about the concept of Welfare State has created new hopes and expectations in the heart of millions of people especially

the poor and the oppressed. These expectations also emerge from their growing consciousness of freedom which includes freedom from poverty and dependence, satisfaction of human needs and opportunity to advance in socio-economic and political aspects of life. These demands of the people for socio-economic freedom under the label "social justice" cannot be ignored by judges while interpreting the Constitution. Constitutional and legal interpretations should have a purpose which is promotion of "social justice". So the judicial power of the judges must be creatively used to meet the rising expectations of the have-nots and to realize the goals of the Constitution.

The judges also have a creative role to play in the moral development of a society. Absence of any policy-making institution that deals with political-moral problems, can be a serious defect in a government.

The idea of creative and liberal interpretation of the Constitution does not allow the judges to do whatever they like while interpreting the Constitution and the laws. In this matter their freedom is restricted and limited by the social philosophy of the Constitution itself. Every interpretation must be guided and inspired by the social philosophy and values of the Constitution alone and not by the whims and fancies and the personal philosophy of the judges.

In short the social philosophy of the Constitution must guide a judge's decision-making process and he must adopt a broad activist's goal-oriented approach directed towards advancing constitutional objectives when he is interpreting the Constitution and the statutes.

It is only a progressive and dynamic and activist judiciary fully committed to the social philosophy and democratic principles of the Constitution can interpret the Constitution in a creative way and enhance the process of achieving social justice for the suffering millions of India.

Public Interest Litigation

When the feelings of helplessness and anger were growing among the public some sought redress through democratic means and constitutional process. Out of this search for legal solutions emerged the phenomenon of Public Interest Litigation (PIL) in our country. The creative and progressive interpretation of the Constitution of India by the socially conscious activist judges of the Supreme Court enabled common people to have easy access to the Apex Court and to find legal

redress against injustices, corruption and administrative tardiness in implementing government schemes and welfare laws. The judicial activism of some of the progressive judges has given "locus standi" to public spirited individual or social action groups to file petition on his their behalf or on behalf of the poor whose fundamental rights are violated.

Assumptions Behind PIL

The assumption of the activist judges behind PIL were that radical changes in society would come about through the courts of justice if fundamental rights of the weak and poor citizens are enforced effectively. They also thought that the new technique fashioned by the Supreme Court will bring about far reaching changes in the judicial system of the country. Public enterprises, it is believed, are owned by the people and those who run them are accountable to the people. The accountability of the public sector to Parliament in the past is found to be ineffective. In such situation, the judges felt the Constitutional Courts have a moral and legal duty to intervene to safeguard people's fundamental rights guaranteed by the Constitution of India.

What is Public Interest Litigation?

PIL is a "strategic arm" of the legal aid movement and is intended to bring justice within the reach of poor masses. It is a devise to provide justice to those who individually are not in a position to have access to the courts. It was initiated for the benefit of a class of people, who had been denied their constitutional and legal rights because they were unable to have access to the courts on account of their socio-economic disabilities.

According to Justice V.R. Krishna Iyer, PIL is a process of obtaining justice for the public, of voicing people's grievances through the legal process. The aim of PIL is to give to the common people of this country access to the courts to obtain legal redress.

Explaining the characteristic of PIL Justice P.N. Bhagwati said "PIL is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the significant tune of our Constitution. The government and its officers

must welcome PIL because it would provide them an accession to examine whether the poor and the downtrodden are getting their social entitlements or whether they are continuing to remain victims of deception and exploitation at the hands of strong and powerful sections of the community. When the court entertains PIL, it does not do so in a cavilling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic rescue programmes, legislative as well as executive, framed for the benefit of the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive. The court is thus merely assisting in the realization of the constitutional objective.”¹

Speaking on the importance of PIL Justice Bhagwati in a judgement wrote: “Millions of persons belonging to the deprived and vulnerable sections of humanity are looking to the courts for improving their life conditions and making human life meaningful for them. The time has now come when the courts must become the courts for the poor and struggling masses of this country. Fortunately, this change is gradually taking place and Public Interest Litigation is playing a large part in bringing this change.”²

Constitutional Backing

The new and liberal interpretation of the fundamental rights found its philosophy in Part III and the Directive Principles of State Policy in Part IV of the Constitution of India. They are drawn from the revolutionary documents like the American Bill of Rights and the Universal Declaration of Human Rights.

Article 32(1) guarantees the right to move the Supreme Court by appropriate proceedings for the enforcement of the fundamental rights. Article 32(2) states that the Supreme Court shall have the power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate for the enforcement of any of the rights conferred by Part III of the Constitution.

Article 226 states that notwithstanding anything contained in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or

authority, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III (fundamental rights) and for any other purpose.

The meaning and scope of Articles 14, 21 and 32 of the Constitution were given a wider interpretation in favour of the weaker sections. The right to life was interpreted to mean a right to livelihood as well. Similarly, the right of equality under the law guaranteed by Article 14 was interpreted to provide a right against executive and administrative arbitrariness in any decision making.

New Interpretations of 'Locus Standi'

According to the traditional Anglo-Saxon concept of 'locus standi' only the person whose rights were violated could sue for judicial redress. No one else could file a petition in the court on his behalf. This doctrine was evolved in an era when the courts were mainly concerned with the rights of the individual. Therefore it has been felt that the traditional interpretation of 'locus standi' should be changed to bring justice within the reach of the poor masses.

According to the new interpretation of this doctrine when the rights of an individual or a class of persons are violated and if by reasons of poverty or disability they cannot approach the court themselves, any public spirited person or institution, acting in good faith, and not out of vengeance, can move the court for judicial redress.

In *S.P. Gupta vs. Union of India*,³ a seven-Judge Constitution Bench, by a majority, ruled that any member of the public acting *bona fide* and having sufficient interest in instituting an action for redressal of public wrong or public injury, but who is not a busy body or a meddlesome interloper, could move the court. The court will not insist on strict procedures when such a person moves a petition on behalf of another or a class of persons who have suffered legal wrong and they themselves cannot approach the court by reason of poverty, helplessness or social backwardness.

"It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal

provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.”

Use of Judicial Activism and PIL for Protecting and Promoting Human Rights and Justice

Right to personal liberty and right against inhuman treatment

By giving a radical interpretation to Article 21 of the Constitution the Supreme Court began a trend in 1950 to emphasise protection of life and personal liberty of citizens especially those in prison (*A.K. Gopalan's*⁴ case). In *Maneka Gandhi's*⁵ case, the Supreme Court upheld the right to life and personal liberty of citizens from the executive as well as the legislative actions.

The Apex Court has similarly responded to several other cases to promote personal liberties of citizens. In cases of illegal arrest, detention, custodial death and torture by police officials and government agents the court asked the government to pay compensation for destruction of life and liberty. This sort of response was unusual in criminal jurisprudence. To promote justice and to protect life the court dispensed with the legal formalities and procedures. Even a letter written by an affected person in emergency situation was accepted by the Supreme Court as a writ petition because the court felt that life and liberty are precious gifts of God and that must be saved by all means even at the cost of legal formalities. By introducing simple formalities to save life and liberty the Apex Court has revolutionised the entire approach and has been able to bring justice to the oppressed persons. The landmark judgements on the rights of personal liberties are the following:

1. *Sunil Batra vs. Delhi Administration*⁶ - Rights of culprits to have right to dignity.
2. *Prem Sankar Shukla v. Delhi Administration*⁷ – handcuffs to be sued in rarest of rare cases.

3. *Consumer Education & Research Centre v. Union of India*⁸ – Fundamental right to health and medical care.
4. *Bandhua Mukti Morcha vs. Union of India*⁹ – right of workers to be protected from inhuman and intolerable conditions.
5. *Neera Chudhary v. State of M.P.*¹⁰ – Right of bonded labourers to be rehabilitated.

Regarding inhuman treatment of arrested persons and undertrial the Supreme Court made the following ruling:

- Inhuman treatment and torture of persons in custody are gross violation of human rights.
- Custodial death is one of the worst crimes in civilized society governed by law.
- The right inherent in Article 21 and 22(2) of the Constitution require to be jealously and scrupulously protected.
- If the functionaries of the government become law breakers it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself, thereby leading to anarchism: No civilized nation can permit that to happen.
- A person when arrested does not lose his fundamental rights.
- The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenues and other persons in custody except according to the procedure established by law by placing reasonable restrictions as are permitted by law.
- To prevent inhuman treatment of persons in custody the Supreme Court issued certain guidelines to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures. (*D.K. Basu vs. State of West Bengal*).¹¹

Right to live with human dignity

In *Maneka Gandhi and Francis Coralie Mullin*, the Supreme Court held that the right to 'live' is not merely confined to physical existence but it means the right to live with human dignity. The Supreme Court has further elaborated this principle in *People's Union for Democratic Rights vs. Union of India*¹² while dealing with the inhuman conditions of workers employed in the Asiad Project in 1981. In its verdict the

Supreme Court held that non-payment of minimum wages to the workers was denial of them of their rights to live with basic human dignity. The court further held that the rights and benefits conferred on the workman employed by a contractor under various labour laws are clearly intended to ensure basic human dignity to workmen and if workmen are deprived of any of these rights and benefits that would clearly be violation of Article 21. Speaking for the majority of judges in the said case Justice Bhagwati said that non-implementation by private contractor and non-enforcement by state authorities of the provisions of various labour laws violated the fundamental rights of workers "to live with human dignity".

This judgment initiated a legal revolution. It has protected the interests of millions of workers in factories, mines, fields, brick kiln quarries and it enables them to live with human dignity.

Right to livelihood

Article 21 guarantees that a person's life cannot be taken away except through a procedure established by law which is just, fair and reasonable. In dealing with the eviction cases of slum dwellers the court held that no person can live without the means of livelihood. [*Olga Tellis vs. Bombay Municipal Corporation*.¹³ Expanding the reach and ambit of Article 21 the Supreme Court ruled that "if the right to livelihood is not treated as part of the constitutional rights to life, the easiest way of depriving a person of his right to live would be to deprive him of his means of livelihood. This principle was re-emphasised in *D.K. Yadav vs. J.M.A. Industries* case (AIR 1993 SCW 1995). In this case, the Supreme Court ruled that "right to life enshrined under Article 21 includes the right to livelihood and therefore termination of service of a worker without giving him reasonable opportunity of hearing is unjust, arbitrary and illegal." ¹⁴

Socio-Economic Rights and Justice

In the context of globalization and liberalization judiciary in India must take initiative to enable the government to implement the socio-economic rights of the people envisaged in Part IV of the Constitution as Directive Principle of State Policy. These principles are not enforceable through a court of law and do not create any justiciable rights in favour of the individuals. But if there is a legislation to implement any Directive Principle, a person can approach the court in

case of its violation. It is the duty of the legislature to enact specific laws based on the Directive Principle which contains the socio-economic rights of the citizens. It is the legislature who has to determine the choice of priorities in a matter of policy taking into consideration the various factors of constraints. However while dealing with PILs related to the Directive Principles the judiciary in the past had given directions to the legislature to enact laws especially pertaining to Uniform Civil Code, environmental protection, primary education, public health and other matters related to the socio-economic rights of the common people. This is an area where the positive judicial activism can promote socio-economic justice by radical interpretation of the Constitutional principles.

Right to End One's Own Life

In *Smt. Gian Kaur vs. State of Punjab*¹⁵ a full bench of the Apex Court held that:

- The right to life does not include the right not to live.
- Right to life is not optional but compulsory.
- The state cannot bestow a right to die on the citizens.
- The state is constitutionally bound to protect a citizen's life, however miserable it may be.
- The above rights and principles emerge from Article 21 of the Constitution of India which guarantee the right to life only.

Right to Privacy

Giving a deeper meaning to article 21 of the Constitution the Apex Court in *Auto Shankar case (R. Rajagopal vs. State of Tamil Nadu)*¹⁶ and in telephone-tapping case – *PUCI vs. Union of India*¹⁷ held that:

- Every citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing etc.
- Every person has the right to be alone.
- No one has the liberty to publish anything concerning the above matters without his consent. If he does so he would be violating the right of the person concerned and would be tortiously liable.
- Right to privacy is part of right to life and that right includes telephone conversation in privacy, in home or office unless it comes within the grounds or restriction under Article 19(2) of the Constitution.

Right to Speedy Trial

The Supreme Court of India also adopted an activist approach and took positive steps in the direction of implementing Article 14(3) of the International Covenant on Civil and Political Rights which lays down that every one shall be entitled in the determination of any criminal charge against him “to be tried without undue delay”. Article 16 of the principles of equality in the administration of justice reiterates that every one shall be guaranteed in the determination of any criminal charge against him, the right to prompt and speedy hearing. The Supreme court of India in : (1) *Raghubir Singh vs. State of Bihar*¹⁸; (2) *Abdul Rehman Antulay vs. R.S. Nayak*¹⁹; (3) *Common Cause vs. Union of India*²⁰ held that the right to speedy trial is one of the dimensions of the fundamental right to life and liberty guaranteed by Article 21 of the Constitution.

It further held that “it is the Constitutional obligation of the Supreme Court as the guardian of the fundamental rights of the people to enforce the fundamental rights of the accused to speedy trial by issuing the necessary directions to the state which may include taking of positive action such as augmenting and strengthening the investing active machinery, setting up of new courts, building, providing more staff, appointment of additional judges and other measures calculated to ensure speedy trial.”²¹

Right to Bail

The entire law of bail was humanized by judicial interpretation of article 21 and the Supreme Court held the following ruling on bail matters. (*Hussainara Khatoon vs. State of Bihar*)

- The bail system prevalent in our country is oppressive and discriminatory against the poor, since the poor would not be able to furnish bail on account of their poverty. The court, by ignoring the differential capacity of the rich and the poor to furnish bail and treating them equally, produces inequality between the rich and the poor.
- The bail system should be thoroughly reformed so that it should be possible for the poor to obtain pre-trial release as easily as the rich without jeopardizing the interests of justice.
- The court and the police must abandon the antiquated practice of release only against bond with sureties, and if the accused has ties in the community and there is no substantial risk of no –appearance, he

may be released on his personal bond without monetary obligation, subject to penalty in case of breach.

- The amount of bond the Court fixes to release the accused on personal bond should not be based merely on the nature of the charge but on the financial capacity of the accused and the probability of the absconding.
- When the accused is released on personal bond, the court or the police should not insist upon inquiring into his solvency as a condition of acceptance of his personal bond.

Right to Health and Medical Care

Through some of its judgements related to Article 21 the Apex Court declared right to health and medical care as fundamental right. In *Vincent Panikulangara vs. Union of India*²² the Supreme Court held:

- A healthy body is the very foundation for all human activities.
- In a welfare state, it is the obligation of the state to ensure the creation and sustaining of conditions congenial to good health.

Further in *Parmanand Katara v. Union of India*²³, a petition was filed under Article 32 of the Constitution, when a private doctor refused to treat a patient who met with an accident because of non-compliance of procedural formalities regarding accident victims. The Court ordered the medical institution to provide medical aid and treatment immediately irrespective of whether the procedural formalities have been complied with. The observation in *Parmananda Katara* created a new right—the right to get medical aid and it has become an integral part of Article 21 of the Constitution. This stand has been retreated by the apex court in *consumer Education and Research Centre v. Union of India*²⁴. It was held that 'the right to health and medical care is fundamental right under Article 21 read with Articles 39(c), 41 and 43 of the Constitution and make life of workman meaningful and purposeful with dignity of person. Right to life which includes protection of health and strength of worker is a minimum requirement to enable a person to live with human dignity.

The activist approach of the Court did not stop with the making of the above observations but also extended to issuing many directions in order to effectively protect the public health. In *Paschim Banga Khet Mazdoor Samiti vs. State of West Bengal*,²⁵ the Court ordered the State to equip the public health centres with adequate facilities, to upgrade

the hospital at District and Sub-Divisional levels so as to treat serious cases and to give specialized treatment; to make proper arrangement of ambulance for transportation of patients etc.

The judiciary's observation in the aforesaid cases give a clear picture that access to medical treatment has become a part of Article 21 of the Constitution. Quite apart from that the Supreme court has ruled that 'the right to live with human dignity encompasses within its ambit the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed', and held that hygienic environment is an integral facet of right to healthy life."²⁶

Right to Environmental Protection

"Protection of the environment is not only the duty of the citizen but it is also the obligation of the State and all other State organs, including Courts. In that extent, environmental law has succeeded in unshackling man's right to life and personal liberty from the clutches of common law theory of individual ownership. Examining the matter from above constitutional point of view, it would be reasonable to hold that the employment of life and its attainment and fulfillment guaranteed by Article 21 of the Constitution embraces the protection and preservation of nature's gifts without which life cannot be enjoyed. There can be no reason why practice of violent extinguishments of life alone should be regarded as violative of Article 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoliation should also be regarded as amounting to violation of Article 21 of the Constitution."

"It becomes the legitimate duty of the Courts as the enforcing organs of constitutional objectives to forbid all action of the state and the citizen from unsettling the environmental balance."²⁷

"The right to life in Article 21 of the Constitution of India does not fall short of the requirements of qualitative life which is possible only in an environment of quality. Where, on account of human agencies, the quality of air and the quality of environment are threatened or affected, the Court would not hesitate to use its innovative power within its epistolary jurisdiction to enforce and safeguard the right to life to promote public interest. Specific guarantees in Article 21 unfold penumbras shaped by emanations from those constitutional assurances which help

give them life and substance. In the circumstantial context and factual back-drop, judicial intervention is warranted especially since the Supreme Court of India has already laid the foundation of juristic activism in unmistakable language of certainty and deep concern."²⁸

"Entitlement of a clean environment is one of the recognized basic human rights and human rights jurisprudence cannot be permitted to be thwarted by status quoism on the basis of unfounded apprehensions."²⁹

Right to Education

In *Mohini Jaina vs. State of Karnataka*,³⁰ *Bandhua Mukti Morcha*³¹ and *Unnikrishnan J.P. vs. State of Andhra Pradesh*³² the importance of education has been duly and rightly stressed. Without education being provided to the citizens the objectives set forth in the Preamble of the Constitution cannot be achieved. Based on Articles 21, 41, 45 and 46 of the Constitution of India the Supreme Court ruled that:

- The right to education is held to be implicit in the right to life because of its inherent fundamental importance.
- A person cannot live with human dignity unless he is properly educated.
- The right to education means that a citizen has a right to call upon the State to provide educational facilities to him within the limits of its economic capacity and development.
- The fundamental right to free education is available only to children until they complete the age of 14 years. Thereafter the obligation of the state to provide education is subject to the limits of its economic capacity and development.

The declaration that primary education is a fundamental right of a child can bring about new revolution in the life of the weaker sections of society. Under this fundamental right every child especially the poor is entitled to get free education from the state. Only education can lead a person, community of nation to overall development.

Victim's Right to Compensation for Violations of Fundamental Rights

Since right to life and personal liberty are the most important fundamental rights guaranteed by the Constitution of India, State is bound to protect them. If a citizen's right to life and personal liberty are violated

by the State agencies the government is bound to pay compensation to the victims. Article 32 of the Constitution empowers the Supreme Court not only to prevent the infringement of fundamental rights but also to grant compensation. In *M.C. Mehta vs. Union of India*³³ the Supreme Court said, “the power of the court to grant such remedial relief may include the power to award compensation in appropriate cases.” The Apex Court clarified that the appropriate cases are those cases where “the infringement of fundamental right is gross and glaring.” According to the Court the infringement should be on a large scale affecting the fundamental right of a larger number of persons, or it should appear unjust or unduly harsh or oppressive on account of their poverty and disability or socially or economically disadvantaged position to require the person affected by such infringement to initiate and pursue action in civil courts.

Following are some of the landmark judgements in which the Supreme Court awarded compensation.

- In *Rudal Shah vs. State of Bihar*,³⁴ In this case the court awarded Rs. 30,000 as compensation to the petitioner who had to remain in jail for 14 years because of the irresponsible conduct of the State authorities.
- In *Bhim Singh vs. State of J&K*,³⁵ the petitioner was awarded compensation of Rs. 50,000/- for illegal detention and thus violating his constitution right.
- In *People's Union for Democratic Rights vs. Police Commissioner, Delhi Police Headquarters*³⁶, the court ordered the Delhi Administration to pay Rs. 75,000/- to the family of a labourer who was beaten by police in the police station for demanding wages for the work he has done for the police.
- In *Saheli vs. Commissioner of Police*,³⁷ the court directed the government to pay Rs. 75,000/- as compensation to the mother of a boy aged 9 years who died because of beating by the police officer. The writ was filed by a women's organisation known as SAHELI on behalf of the mother of the victim.
- In *Chirajit Kaur vs. Union of India*,³⁸ the petitioner's husband a major in the Army died while in service in mysterious circumstances. His death was not properly investigated by the Army authorities

concerned. Indifference and culpable negligence were noticed in the investigation. The court held that the widow and her minor children were entitled a compensation of Rs. Six lakhs as well as to the special family and children allowance according to the relevant rules.

- In *Kewal Pati vs. State of U.P.*³⁹ the court awarded compensation to the wife of a convict who was killed by a co-accused in jail while serving out his sentence under section 302 IPC. It was held that the killing in jail deprived his life contrary to law.

- In *Nilabati Behera vs. State of Orissa*,⁴⁰ the complaint was filed by the mother of an accused person who was arrested, tortured and killed by the police. The dead body with handcuffs was found on the railway tracks. The police defence was that the accused managed to escape from the police custody by chewing the rope with which he was tied and he was run over by a passing train.

The mother of the deceased sent a letter to the Supreme Court alleging custodial death of her son and claimed compensation on the ground of violation of Article 21. The court treated the letter as a writ petition under Article 32 and impleaded the State of Orissa, the Police ASI and the concerned constable as respondents in the petition. On the basis of evidence of the doctor who conducted post mortem examination and the report of forensic science laboratory the court held that the deceased had died in the police custody. Taking into consideration the deceased person's age and salary the state was ordered to pay Rs. 1,50,000/- as compensation to the mother of the deceased. It also directed the State to pay Rs. 10,000/- to the Supreme Court Legal Aid committee as costs of the litigation. The court clarified that the compensation awarded in this case will not affect the petitioner's right to claim compensation in other proceedings.

- In *Arvinder S. Bagga vs. State of U.P.*⁴¹ police had arrested a married woman on the pretext of her being a victim of abduction and rape. She was threatened and commanded to implicate her husband and his family in an abduction and forcible marriage thereafter. The police officer subjected her to physical, mental and psychological torture to make her submit to the demand of the police and to abandon her legal marriage. The court ordered the State to pay Rs. 10,000/- to the victim of police atrocities.

In the above cases the Apex Court ruled that in all cases of loss of life and personal liberty at the hands of State officials both State and officials are jointly and severely criminally liable.

Right to Free Legal Aid

Judicial activism was in its peak when the Supreme Court declared the right of the poor litigants for free legal services to protect them against injustice and to secure them their constitutional and statutory rights. On this matter the court said, "it is now well settled, as a result of the decision of the Supreme Court in *Maneka Gandhi v. Union of India*⁴² that when article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure under which a person may be deprived of his life or liberty should be 'reasonable, fair and just'. Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as 'reasonable, fair and just'. It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him. Hence free legal services to the poor and the needy is an essential element of any 'reasonable, fair and just' procedure." The court held that "without the services of a lawyer an accused person would be denied 'reasonable, fair and just' procedure."⁴³

In the above case the Supreme Court of India accepted the philosophy of free legal services proposed by Justice Douglas (USA), who said, "The right to be heard would be, in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare this defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty,

he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate or those of feeble intellect.”⁴⁴

Speaking on the importance and need of having a dynamic and comprehensive legal services programme in India the Apex Court said, “In our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them. The poor in their contact with the legal system have always been on the wrong side of the line. They have always come across ‘law for the poor’ rather than ‘law of the poor’. The law is regarded by them as something mysterious and forbidding—always taking something away from them and not as a positive and constructive social device for changing the social economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker sections of the community. It is, therefore, necessary that we should inject equal justice into legality and that can be done only by a dynamic and activist scheme of legal services.”⁴⁵

Limit to Judicial Activism

Judicial activism is justified in the face of executive inaction and indiscretion. It is a response to lawlessness of the executive which is the most intransigent problem of the people of India. But there is a limit to it for the judiciary cannot be the quick fix for all problems.

Judicial activism is valid as far as it protects the public from the depotism of the executive, but it must not lead to government by the judiciary. That would be unhealthy, if not dangerous for any democracy. Judiciary must function within the Constitutional bounds. Its decisions should have a jurisprudential base.

Courts have to be careful to see that they do not overstep the limits because to them assigned the sacred duty of safeguarding the constitution. People of our country have reposed great faith and trust in the judiciary. So the courts have to act as their trustees.

Judicial activism should not be misconducted as a tool against the legislature and the executive, and the judiciary should not expand their powers at the cost of the other pillars of democracy. It should not upset the fine system of constitutional checks and balances.

The power of judicial review of executive and legislative action must be kept within the bound of the Constitutional scheme so that there may not be any occasion to entertain misgivings about the role of judiciary in outstepping its limit by unwarranted judicial activism. Excessive or ill-judged activism may damage the very institution which gave birth to it.

Conclusion

Purposive Public Interest Jurisdiction and judicial activism are eminently necessary and have great potential for preventing the executive and legislative getting arbitrary and wayward.

It have become abundantly clear that when other institutions fail the judiciary is the only refuge for justice, fair play, equity and security of life.

Judicial activism has played remarkable role especially in protecting the interest of the poor and the oppressed. It has contributed a lot in obtaining major socio-economic rights that are enshrined in the Constitution of India. In accomplishing the above goals, at times, judicial activism has sent shock waves to the corrupt politicians and bureaucrats, which is welcomed by all.

An independent, impartial and fearless judiciary is a great asset of our nation. That is the reason our founding members of the Constitution tried to insulate the judiciary from outside influence.

Judiciary's response to common people's plea for justice cannot be considered as an interference in the functioning of Parliament and the Executive. All rulings were a judicial necessity. Public reaction to the rulings has given a new image to the courts and a new vigour to the whole system of judiciary.

Our judiciary through its judicial activism has upheld the rule of law, preserved our constitutional values and made some fundamental rights living realities for some of the deprived and oppressed segments of Indian humanity. Its active role has created a climate of transparency and engendered a sense of accountability in public functionaries. Today the Indian judiciary is in a respectable position to expose the areas of darkness in the administration and find solution to it. So the great strength of the judiciary must be utilised always in public interest and in the service of the people.

In a country governed by the rule of law all the democratic institutions should work together to achieve the constitutional goals of protecting human rights and promoting socio-economic justice by following such ideals as self restraint, honesty, mutual respect and fair treatment.

Foot Notes

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|----|---|----|--------------------------|
| 1 | AIR 1984 SC 802 | 28 | AIR 1992 Karnataka 57 |
| 2 | AIR 1982 SC 1473 | 29 | AIR 1992 Karnataka 57 |
| 3 | AIR 1982 SC 149 | 30 | (1992)3 SCC 666 |
| 4 | AIR 1950 SC 27 | 31 | (1984) 4 SCC 161 |
| 5 | AIR 1978 SC 597 | 32 | (1993) 1 SCC 645 |
| 6 | AIR 1975 SC 1575 | 33 | AIR 1987 1086 |
| 7 | AIR 1980 SC 1535 | 34 | (1983)4 SCC 141 |
| 8 | AIR 1995 SC 922 | 35 | (1985) 4 SCC 677 |
| 9 | AIR 1984 SC 802 | 36 | (1989) 4 SCC 230 |
| 10 | AIR 1984 SC 1099 | 37 | AIR 1990 SC 513 |
| 11 | AIR 1997 SC 610 | 38 | (1994) 2 SCC 1 |
| 12 | AIR 1982 SC 1473 | 39 | (1995) 3 SCC 600 |
| 13 | AIR 1986 SC 180 | 40 | (1993) SCC 746 |
| 14 | AIR 1993 SCW 1995 | 41 | (1994) 4 SCC602 |
| 15 | AIR 1996 SC 1257 | 42 | (1978) 1 SCC 248 |
| 16 | AIR 1995 SC 264 | 43 | AIR 1979 SC 1369 AT 1373 |
| 17 | AIR 1997 SC 568 | 44 | supra at 1374 |
| 18 | AIR 1987 SC 149 | 45 | supra at 1375-76 |
| 19 | (1984) 2 SCC 183 | | |
| 20 | (1996) 4 SCC 44 | | |
| 21 | AIR 1979 SC 1369 | | |
| 22 | AIR 1987 SC 990 | | |
| 23 | AIR 1989 SC 2039 | | |
| 24 | AIR 1995 SC 922 | | |
| 25 | AIR 1996 SC 2426 | | |
| 26 | 2000 AIR Journal 17 at 21 | | |
| 27 | Gayatri Singh, Kerban Anklesaria and Colin Gonsalves (d), "The Environmental Activists' Handbook," p. 355-356 | | |

A POSTSCRIPT TO MY BOOK “INDIAN CHURCHES AT THE CROSSROADS”(1995)

My book, *Indian Churches at the Crossroads (1995)* was criticized by some people, and some of my views were questioned as not in conformity with the teachings of the Catholic Church. Hence I thought of writing this Postscript in order to clarify my views and to remove misunderstandings, if any. First of all, it is to be kept in mind that my book, “Indian Churches at the Crossroads”(Rome - Bangalore: 1995) is a collection of papers and articles, which I had presented in different Ecumenical Conferences and published, in Ecumenical Journals at different times. Some of those papers I had further revised and edited, and delivered them as “Placid Lectures” at the Centre for Indian and Interreligious Studies in Rome in 1994. This ecumenical context and perspective of my writings must be kept in mind in order to understand them properly. Secondly, If I am pointed out by the proper authorities of the Catholic Church that any of the theological views and statements in my book is not in accordance with the official teachings of the Church, I am ready to correct my self most willingly.

Unity as Communion of Churches

I have presented in my book the Vision of an Ecumenical Church in terms of ‘Communion of Churches’ or ‘Fellowship of Churches’ where all the Churches have to be closely united in the same Apostolic Faith, in the same Sacraments and in the same Hierarchy united under

the Roman Pontiff. But this unity cannot be promoted by imposing uniformity, but by acknowledging, respecting and promoting a healthy diversity. Vatican II emphasized the rich diversity of the Churches while underlining their unity. "While preserving unity in essentials, let all members of the Church, according to the office entrusted to each, preserve a proper freedom in the various forms of spiritual life and discipline, in the variety of liturgical rites and even in the theological elaborations of revealed truth. In all things let charity be exercised" (UR, no.4). Commenting on the question of unity in diversity, Cardinal Jan Willebrands proposed "moving towards a typology of the Churches" (see, *The Catholic Mind*, April 1970, pp.40-42). In the one communion of Churches we can envisage different types of Churches. In this sense, "the One Church exists in the many Churches".

But along with "Ecclesia in et ex Ecclesiis", I definitely accept also "Ecclesiae in et ex Ecclesia", otherwise, the Universal Church will be simply the collective grouping or adding up of the different particular/individual/local Churches. The Universal exists in the particular and the particular exists in the universal. It means the mutual indwelling of the Universal and the Particular. In this sense the different Churches exists in the One Church. We all confess that the Church is One, Holy, Catholic and Apostolic. But acceptance of the One Church does not mean the denial of the reality of the many Churches within the unity of the One Church. The relationship of the One Church to the Many Churches is a crucial ecumenical problem. I accept the clarification and explanation given in the Notification of the Congregation for the Doctrine of the Faith on "Lumen Gentium n.8" that the word "subsistit" is chosen to clarify that there exists only one "subsistence" of the true Church while outside of its visible framework there exists only "elementa ecclesiae" which - being elements of the same Church - tend and lead toward the Catholic Church (UR 3-4). I also subscribe to the teachings of LG nos. 14-16 which explain the different levels of belonging to the People of God, and that it is the Catholics who are "fully incorporated" into the Church as the People of God, as the Catholic Church manifests the fullness of the sacramental bonds of the fullness of faith, of the

sacraments and the fullness of the hierarchy and of the Communion (LG n.14).

An Ecumenical Papacy

Papacy is one of the crucial ecumenical problems today as all other Churches, Orthodox, Protestant and Anglican, reject it. In 1967 Pope Paul VI in his address to the Roman Secretariat for Christian Unity said, “The Papacy constitutes the greatest obstacle to reunion”. But today there are some hopeful signs in the Ecumenical Movement that some of the contemporary bilateral dialogues (for example, Catholic-Anglican dialogue, and Catholic- Lutheran dialogue) have taken up the topic of Papacy for dialogue, and spoke of a “Petrine function”, “ a universal primacy”, “a renewed papacy”, “an ecumenical papacy”, “a reconstituted papacy” to preside over the ecumenical communion of Churches and to be an instrument of reconciliation and unity (See, Harding Meyer and Lukas Vischer, eds., *Growth in Agreement : Reports and Agreed Statements of Ecumenical Conversation at a World Level*, Geneva: WCC, 1984, p.108). In my book I am referring to these ecumenical dialogues among Churches and theologians (pp. 21, 23) and welcome such a dialogue on Papacy. Pope John Paul II himself welcomed and positively invited such ecumenical dialogues and expressed willingness to discuss the question of Papacy and to seek “the forms in which this ministry may accomplish a service of love recognized by all concerned” (*Ut Unum Sint*, no. 95). I do not question the teachings of Vatican I and II on Papal Primacy. As a faithful member of the Catholic Church, I entirely accept the doctrinal teachings of the First and Second Vatican Councils on Papal Primacy and Infallibility. .

Perspectives of the Poor

Theology and ‘theologizing’ today must become more and more “ecumenical” by opening up to the resources and insights coming from all quarters: “Perspectives of the poor and the oppressed, those of women and those coming from all religious traditions, ideologies and human sciences must be integrated into the theological process so that theology may become fully and thoroughly ecumenical” (p.55). Perspectives

and insights of the poor and the oppressed is only one among the criteria of an “ecumenical theology”, not the sole criterion. Perspectives of the rich and the dominant classes are often one-sided, and they try to maintain the *status quo*, which is for their own advantage. Hence their perspectives need a corrective from the perspective of the poor and the oppressed, and what is needed is mutual correction and complementarity (p.48).

I do not hold the view that the perspectives and insights of the poor and the oppressed are the only true point of view. Nor do I hold the view of a class analysis of the theological statements as the only methodology. I am just telling that in some of the traditional theologies the perspectives of the rich and dominant classes got the upper hand, and that it must be balanced by attending to the perspectives and insights of the poor and the oppressed so that theology may become more “ecumenical” or inclusive.

Feminist Perspective

Perspectives of women have to be included so that theology may become more “ecumenical” as in the case of the perspectives of the poor and the oppressed, mentioned above. It is a fact that our contemporary society is rejecting the Patriarchal type and entering into an egalitarian type of society where the equality of men and women are being accepted both in theory and practice. Accordingly, women are taking their rightful place along with men both in society and in the Church. Many of the Protestant Churches, the Anglicans and the Church of South India and North India have changed their rules in our own times and accepted women to the ordained ministry. Several Catholic theologians interpreted the longstanding tradition of the Catholic Church of not admitting women to the ordained ministry as a custom and tradition of a patriarchal society and culture. When the society changes, they argued, the Church could also change this tradition. Honestly speaking, I also was inclined to hold this view, though I never wrote on this subject. But now after the publication of the Apostolic Letter of Pope John Paul II, *Ordinatio Sacerdotalis*, and after the *Responsum ad dubium* of the CDF (1995), I am prepared to accept the Catholic teaching on this

question as contained in the Apostolic letter, *Ordinatio Sacerdotalis*, "that the Church has no authority whatsoever to confer priestly ordination on women, and that this judgement is to be definitely held by all the Church's faithful".

Christ and Other Religions

The roles of other religions in God's plan of salvation and the salvation of those who belong to other Faiths and their relationship to Jesus Christ and the Church are questions, which need theological clarifications today. The Vatican II has only initiated a discussion on these questions. Speaking about the salvation of non-Christians, the Council simply says that "God gives them the necessary help for salvation if they lead a good life and live according to the dictates of their conscience"(LG, 16).

I basically accept the teaching of *Redemptoris Missio* (RM) that "Christ is the one mediator between God and mankind". God's plan of salvation is one, namely, one economy of salvation for the whole humankind. But this one plan or one economy of salvation does not exclude the positive roles of other religions. RM also speaks about other "participated forms of mediation of different kinds and degrees" where other religions may be included. But as RM says mediation by Christ and mediation of other religions are not parallel mediations, but they are closely related as there is only one economy of salvation. Theology has not yet sufficiently explained how they are related. For the moment we can only assert that they are related in a mysterious way.

I fully accept the uniqueness of Jesus Christ in God's plan of salvation. I have stated this clearly in my book: "There is no question of jettisoning or compromising the uniqueness of Jesus Christ in the new encounter with other faiths. The place and role of Jesus Christ in God' plan of salvation is unique and universal" (p.67). I also accept that the Word (Logos, Christ) and Jesus cannot be separated, since the Word "became flesh" in Jesus Christ. "Jesus is the incarnate Word- a single and indivisible person", as pointed out by RM (no.6). But we can make distinctions. The Word, the Second Person of the Trinity, the Son, existed

from eternity, before Jesus of Nazareth, and the working of the Word was not limited exclusively to Jesus of Nazareth. This is what I mean when I say that "the mystery of God and that of the Second Person of the Trinity, Christ, the Logos, the Word, cannot be exhausted by the history of Jesus of Nazareth" (p.68). God revealed Himself even before Jesus of Nazareth, and the Word was present in the whole creation, and in all philosophies, religions and cultures as taught by the early Fathers of the Church. Accordingly, we have to admit that the Spirit is active in the religious traditions of humanity and that the Spirit is associated with the work of revelation. So God's revelation is not limited to Judeo-Christian tradition alone, though we can make distinctions, such as, universal revelation, general revelation, cosmic revelation, historical revelation, special revelation etc. But these revelations of God are not parallels; they are to be seen as related and complementary.

When I speak about the complementary aspects of revelation in Jesus Christ and the presence and activity of Spirit elsewhere in the world, in other religions and cultures, I do not mean to say that revelation in Christ is incomplete. I accept that revelation of God in Jesus Christ is definitive, complete and final that "God has made himself known in the fullest possible way (in Jesus Christ)" (RM n.5). I accept that Christ is the one mediator between God and mankind as attested in the New Testament, and the teaching of RM that "although participated forms of mediation of different kinds and degrees are not excluded, they acquire meaning and value only from Christ's own mediation, and they cannot be understood as parallel or complementary to his" (RM n.5). The complementary aspect of God's revelation consists in this that God's revelation in Jesus Christ is better understood and explained in the background of the whole salvation history and God's action in the whole humankind. Similarly God's action in the world or the presence and action of the Spirit in other peoples, their cultures and religions can be understood only in relation to God's action in Jesus Christ. There is only one salvation history and God's one universal plan of human salvation.

Christian Proclamation

I accept that my statement in the book that “the Church’s proclamation of the Good News need not necessarily and explicitly be the person of historical Jesus, but his message of the Kingdom of God and the Kingdom values” (p.79) can be misleading. The Kingdom of God became clearly manifest in Jesus; He is the embodiment of the Kingdom. The Good News is God’s plan of salvation and redemption in Jesus Christ. So we cannot separate Kingdom and Jesus. What I wanted to say is that proclamation of the Kingdom of God and of the Kingdom Values seems to be an easier and relevant entry-point for evangelization among the people of other religions, or in a multi-religious context as in the case of India. There are different paths of evangelization as presented in *Redemptoris Missio*. Direct proclamation of Jesus Christ, proclamation of the Kingdom and its values, liberation and the work for social justice, development and peace, interreligious dialogue, inculturation, evangelization of cultures etc are the different paths of mission. But I accept and I am convinced that proclamation of Christ is the heart or core of evangelization. It cannot be substituted by anything else. As disciples of Jesus Christ, we have to proclaim Him to all peoples. But the question how to proclaim and when to proclaim Jesus Christ in a multi-religious context needs further exploration. In a multi-religious context and in the context of poverty and human misery, we need not start with direct proclamation, but may start with other paths. But at some point we have to present Jesus Christ with direct proclamation. For in Jesus salvation is offered to the whole humankind, and Jesus is the ultimate answer to the human quest for life in its fullness.

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1. The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of life, and shows that the most probable theory is that of spontaneous generation. He then discusses the evidence in favor of this theory, and shows that it is supported by the facts of the case.

2. The second part of the paper is devoted to a discussion of the problem of the origin of the human race. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of the human race, and shows that the most probable theory is that of spontaneous generation. He then discusses the evidence in favor of this theory, and shows that it is supported by the facts of the case.

3. The third part of the paper is devoted to a discussion of the problem of the origin of the human mind. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of the human mind, and shows that the most probable theory is that of spontaneous generation. He then discusses the evidence in favor of this theory, and shows that it is supported by the facts of the case.

4. The fourth part of the paper is devoted to a discussion of the problem of the origin of the human soul. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of the human soul, and shows that the most probable theory is that of spontaneous generation. He then discusses the evidence in favor of this theory, and shows that it is supported by the facts of the case.

5. The fifth part of the paper is devoted to a discussion of the problem of the origin of the human body. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of the human body, and shows that the most probable theory is that of spontaneous generation. He then discusses the evidence in favor of this theory, and shows that it is supported by the facts of the case.